90-1123

No. _____

FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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January 14, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment imposes upon state actors an affirmative obligation to prevent a person in government custody from committing suicide.

2. Whether an appellate court properly may decline to review the denial of a public official's defense of qualified immunity to a claim under 42 U.S.C. § 1983, where the public official properly has preserved and asserted, but inadequately argued, the defense.

PARTIES TO THE PROCEEDINGS

Petitioners list herein all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioners and Defendants-Appellants below: Donald Gaigalas, individually and in his official capacity; Ronald L. Tucker; individually and in his official capacity. Defendants-Appellants below: Baltimore County, Maryland, a body corporate and politic; Cornelius J. Behan, individually and in his official capacity as Chief of Police. Defendants: Daniel Yuska, individually and in his official capacity; Joseph Gribbin, individually and in his official capacity; L.S. Harvey, individually and in his official capacity; Kenneth W. Kramer, individually and in his official capacity; and William L. Maeser, individually and in his official capacity. Respondents and Plaintiffs-Appellees below: Barbara Buffington, individually and as personal representative of the estate of James E. Buffington, deceased; and David M. Buffington, individually.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donald Gaigalas and Ronald L. Tucker, police officers of Baltimore County, Maryland, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 913 F.2d 113 (4th Cir. 1990). The February 27, 1989 order of the district court (App. 51a) and the accompanying May 22, 1989 memorandum opinion (App. 53a) denying defendants' motion for judgment notwithstanding the verdict are not reported.

JURISDICTION

The opinion of the court of appeals was entered on July 31, 1990. App. 2a. A petition for rehearing was denied on October 15, 1990. App. 46a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

Section 1983 provides in relevant part:

> Every person who, under color of any [law] . . . of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983.

STATEMENT

1. Shortly after 4:30 a.m. on March 19, 1987, the Baltimore County Police Department received an emergency request to locate 24-year-old James Buffington. App. 3a-4a. David Buffington, Jr., had called the police after discovering that his younger brother, James, had driven off in their father's car with guns from their father's gun closet, leaving behind a suicide note. *Id.* at 3a. At 5:47 a.m. the police located James and brought him to the Wilkens precinct station. *Id.* at 4a. At the station, James told the police that he had not committed suicide " 'because he couldn't decide which gun to use.' " *Id.*

Officer Lewis Harvey informed David Buffington that the police had found James and had already begun preparing "to take James to Greater Baltimore Medical Center for an emergency psychiatric evaluation." *Id.* Involuntary commitment is both a cumbersome process and a process that does not always succeed. Accordingly, to ensure that James would remain within the custody of the police even if the medical center would not admit James, David initiated criminal charges against his brother. *Id.* Established practice at the Wilkens station required that detainees who presented a risk of harm to themselves should remain handcuffed to the rail by the front desk following booking procedures. *Id.* at 4a-5a.[1] Thus, "[f]rom the time he was first brought into the station, Buffington was handcuffed to a rail beside the booking desk in the receiving room of the police station so he could be observed by the desk officers." *Id.* at 4a.

Pursuant to the daily routine at the station, the next shift of desk officers in the County Department—petitioners Gaigalas and Tucker—arrived at the desk at 6:15 a.m. *Id.* at 5a. As the court of appeals noted, "[t]here was conflicting evidence at trial about Buffington's emotional state while handcuffed to the rail" and about the desk officers' knowledge of Buffington's circumstances and suicide threats. *Id.* Petitioner Gaigalas admitted that he knew that Officer Harvey had initiated the process to admit Buffington for an emergency psychiatric evaluation, but Gaigalas denied that he had been told that Buffington had threatened to shoot himself. *Id.* at 5a-6a.

At approximately 6:25 a.m., petitioner Gaigalas uncuffed Buffington from the rail and placed him into a cell. During an observation of the cell at 7:15 a.m., the

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[1] In 1984 the Baltimore County Police Department had adopted "one of the nationally recognized suicide prevention standards" promulgated by the Commission on Accreditation for Law Enforcement Agencies ("CALEA"). App. 6a.

officers discovered that Buffington had committed suicide by hanging himself from the cell's horizontal bars with his pants. App. 5a.

2. Respondents Barbara and David Buffington, James Buffington's parents, filed suit in the United States District Court for the District of Maryland, seeking damages under 42 U.S.C. § 1983 for alleged violations of James' constitutional rights and under Maryland wrongful death and survival statutes for negligence. Respondents not only sued petitioners Gaigalas and Tucker, but also brought claims against Baltimore County, its chief of police, a police department sergeant, corporal, captain and other officers stationed at Wilkens who were on duty on March 19, 1987. Respondents pressed two separate theories of liability under Section 1983: (1) Baltimore County was responsible for failure adequately to train its officers and to implement proper suicide prevention procedures; and (2) the individual officers, including petitioners, acted with "deliberate indifference to Buffington's serious need for some measure of suicide prevention." App. 6a.

On January 18, 1989, the jury rendered a verdict in favor of respondents on both federal law claims, finding Baltimore County, its chief of police, and petitioners Gaigalas and Tucker liable for damages under 42 U.S.C. § 1983.[2] App. 63a. The jury also found the same four defendants liable for negligence under Maryland law.[3] *Id.* at 65a. The jury awarded $185,000 in damages to respondents on both claims. *Id.* at 63a-64a. On February 27, 1989, the district court judge denied the four defend-

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[2] The verdict was rendered in a second trial in this case because the first trial ended in a mistrial when the jury deadlocked. App. 6a.

[3] The jury found that the precinct captain and other officers were not liable, and rejected respondents' claim that certain defendants "had participated in a conspiracy to cover-up the investigation of the suicide." App. 7a n.1.

ants' motion for judgment notwithstanding the verdict or a new trial. App. 51a.[4]

3. A panel of the Fourth Circuit affirmed in part and reversed in part. The court of appeals reversed the Section 1983 judgment against Baltimore County under *City of Canton* v. *Harris*, 489 U.S. 378 (1989), because "there was no evidence that [the County's] failure to train its officers in suicide prevention proximately caused Buffington's suicide." App. 15a. The court of appeals also reversed the Section 1983 judgment against the chief of police on the ground that he "may not be held liable for § 1983 violations for the acts of Officers Gaigalas and Tucker under a theory of *respondeat superior*." *Id.* at 18a. Moreover, the court reversed the state law negligence claims against Baltimore County and the chief of police on the ground that both were entitled to immunity under Maryland law. *Id.* at 20a-25a.

The judgments against petitioners Gaigalas and Tucker were affirmed.[5] The court of appeals rejected petitioners' argument that Buffington lacked a substantive due process right to be protected from his own suicide. *Id.* at 8a. Relying upon this Court's recent decision in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the court of appeals held that because Buffington was in custody at the time of his suicide, "the due process clause did impose an affirmative obligation on the state" to undertake to protect Buffington from injuring himself. App. 10a. The court of appeals held that under *DeShaney*—as well as *Estelle* v. *Gamble*, 429 U.S. 97 (1976), and *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) —the fact that a person is in "state *custody*" imposes a

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[4] The district court awarded respondents $430,658.78 in attorneys fees and costs under 42 U.S.C. § 1988. App. 25a.

[5] The court of appeals remanded for a redetermination of the attorneys fees applicable to the affirmed judgments against petitioners. App. 25a.

constitutional duty of care upon the State. App. 9a (original emphasis).

The court of appeals defined the scope of the duty of care owed in this case "in terms of the recognized duty of care owed to pretrial detainees," App. 10a, *viz.*, the "right to adequate *medical* care at least where the state's failure to provide such care would amount to deliberate indifference to a serious medical need." *Id.* (emphasis added). Because the court found that a "serious psychological impairment can qualify as such a medical need," the court concluded that Buffington had a substantive due process right to have the County take affirmative steps to prevent his suicide while in the County's custody. *Id.* at 11a. Thus, the court approved the jury instructions, which stated that petitioners could be held constitutionally liable if the jury found that the officers "knew that Buffington was suicidal and in need of emergency intervention, but nonetheless acted with deliberate indifference in failing to take any steps to prevent the suicide." *Id.* at 10a.

4. In response to petitioners' argument that they were entitled to qualified immunity as a matter of law, the court of appeals completely refused to entertain petitioners' defense. App. 12a-13a. Petitioners had asserted the defense of qualified immunity in a motion to dismiss the complaint or for summary judgment (*id.* at 14a) and the motion for judgment notwithstanding the verdict (*id.* at 15a) before the district court and had explicitly raised this defense on appeal. *Id.* at 12a-13a (quoting Brief of Appellants).

The court of appeals nevertheless questioned whether petitioners' argument in their opening brief had effectively presented the qualified immunity argument. According to the court, the opening brief "does no more than assert that these individual defendants were entitled to qualified immunity because, *on the merits*, there was no

constitutional violation." App. 13a (original emphasis).[6] The court conceded that "the appellants' reply brief might be read as raising a distinct issue of qualified immunity," but the court nevertheless "decline[d] to give the appellants the benefit of such a liberal reading." *Id.*[7] Thus, despite the absence of any waiver or failure to preserve the defense, the court of appeals refused to consider petitioners' qualified immunity.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided two important questions of federal law concerning the scope of a police officer's liability under the Due Process Clause of the Fourteenth Amendment for failure to prevent a detainee from committing suicide while in police custody. The court's recognition of a constitutional right to be protected from suicide reflects a view of the Due Process Clause that improperly expands the affirmative obligations

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[6] Relying upon and citing *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), petitioners, in their opening brief in the court of appeals, characterized their claim for qualified immunity as follows:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist.

App. 12a-13a (quoting Brief of Appellants at 16-17). Despite the court's critique of the clarity of the argument, respondents clearly understood and opposed the argument for qualified immunity. *Id.* at 13a (quoting Brief of Appellees at 32).

[7] In their reply brief in the court of appeals, petitioners asserted that "the doctrine of qualified immunity protects public officials even when there is a finding that constitutional rights have been violated" (App. 68a), and that to overcome this defense, a plaintiff must show that the constitutional right is "clearly established in a 'particularized' sense, so that 'the contours of the right' are clear enough for any reasonable official in the defendants' position to know that what the official is doing violates that right." *Id.* at 69a (citations omitted).

of the State in a manner inconsistent with the decisions of this Court and of other courts of appeals. Moreover, the ruling of the Fourth Circuit—that the defense of qualified immunity under 42 U.S.C. § 1983 had been "waived" because it was inadequately argued in the opening brief—conflicts with a decision of the Seventh Circuit and also is inconsistent with this Court's decisions concerning the vital role of qualified immunity for public officials in the functioning of our state and local governments. For these reasons, review by this Court of both questions presented is warranted.

A. At the outset it is important to understand precisely what is and what is not the issue in this case. This is not a case about depriving an inmate of adequate medical care. James Buffington's papers for an involuntary commitment to a hospital were being prepared while he was in custody. This is a case involving a duty of custodial care and the issue is whether suicide prevention is an obligation constitutionally imposed upon all government officials who maintain jail facilities.[8]

The decision below is inconsistent with the reasoning of this Court in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which involved a claim against a state social service agency on behalf of a small child who had been severely and permanently injured by his father's abuse. Petitioners in *DeShaney* argued that the state agency—"[h]aving actually undertaken to protect [the child] from this danger"—had "acquired an affirmative 'duty,' enforceable through the Due Process Clause, to [protect him] in a reasonably

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[8] The need to impose a constitutional duty seems particularly questionable in this case where state law tort remedies also are available to respondents. See *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201-03 (1989) (§ 1983 does not constitutionalize all common law torts); *Daniels* v. *Williams*, 474 U.S. 327, 335-36 (1986); *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981); *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); *supra* page 4.

competent fashion," *id.* at 197, and, in particular, to act "to remove [him] from his father's custody." *Id.* at 191.

This Court rejected petitioner's contention, reasoning that

> nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

Id. at 195. Because the Due Process Clause is designed only as a negative prohibition on government action, the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests . . . ." *Id.* at 196.

The opinion in *DeShaney* did acknowledge that "in certain limited circumstances," the Court had recognized constitutional "duties of care and protection with respect to particular individuals." 489 U.S. at 198. One example is embodied in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), which held that "the Eighth Amendment's prohibition against cruel and unusual punishment . . . requires the State to provide adequate medical care to incarcerated prisoners" because inmates cannot obtain such aid on their own. *DeShaney*, 489 U.S. at 198. The other limited circumstance noted in *DeShaney* is the State's obligation "to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others." 489 U.S. at 199 (citing *Youngberg* v. *Romeo*, 457 U.S. 307, 314-25 (1982)).

In circumstances such as those in *Estelle* and *Youngberg*, the State may be constitutionally liable because "the State by the affirmative exercise of its power so restrains

an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . ." 489 U.S. at 199-202. In other words, the State's affirmative constitutional duty arises where the State restricts the individual's ability to care for himself and thereby *causes* the constitutional injury, rather than merely fails to prevent it. In *DeShaney*—unlike *Estelle* and *Youngberg*—the State did not create the circumstances that *caused* the injury and, accordingly, the Court concluded that the State did not have a "constitutional duty to protect" DeShaney against those injuries.

The Fourth Circuit's holding that "the due process clause did impose an affirmative obligation on the state to provide some measure of care" to prevent Buffington's suicide (App. 10a) is inconsistent with this Court's decision in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Focusing on the fact that Buffington was in the custody of the police at the time he committed his suicide, the court of appeals failed to accord the necessary weight to the fact that Buffington's resolve to commit suicide was not created or controlled by state actors. Thus, the court ignored that portion of the *DeShaney* decision that holds that the source of the harm is a significant factor in determining whether the State owes an affirmative constitutional duty. 489 U.S. at 197 ("State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause"). *Cf. Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (constitutional standards are invoked "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains"). Because it fails to accord any weight to the fact that the harm to Buffington resulted directly from his own *private* conduct, the holding of the Fourth Circuit is inconsistent with the constitutional principles set forth in *DeShaney*.

The Fourth Circuit's decision in this case also is squarely inconsistent with the Sixth Circuit's decision in *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990). In *Danese*, the Sixth Circuit held that, as a matter of law, there is no due process right to be protected from suicide. The court found that Danese, a pretrial detainee, had told certain police officers that he was going to kill himself and had even discussed certain methods of doing so. *Id.* at 1243. Danese later hanged himself in his cell. On appeal, the Sixth Circuit reversed the district court's holding that the police officers had breached their constitutional duties to provide Danese with proper medical care and to assure that Danese's conditions of confinement were safe. *Id.* In so holding, the Sixth Circuit stated that the constitutional rights relied upon by the district court simply did not exist. *Id.* at 1244.

Other circuits have followed the rationale of the Sixth Circuit in *Danese* in reviewing Section 1983 claims by survivors of inmates and detainees who take their own lives. See *Dorman* v. *District of Columbia*, 888 F.2d 159, 161 (D.C. Cir. 1989) (reversing determination that a " 'pretrial detainee is constitutionally protected under the Eighth and Fourteenth Amendments from his own suicide' ") (quoting *Dorman* v. *District of Columbia*, No. 85-3587, slip op. at 8 (D.D.C. 1988)); *Freedman* v. *City of Allentown*, 853 F.2d 1111, 1115-16 (3d Cir. 1988) (affirming dismissal of § 1983 action because custodians are not guarantors of safety); *Gagne* v. *City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983); see also *Greason* v. *Kemp*, 891 F.2d 829, 840 (11th Cir. 1990) (Edmonson, J., dissenting) (constitutional analysis should not confuse negligence with deliberate indifference); *Colburn* v. *Upper Darby Township*, 838 F.2d 663, 682 (3d Cir. 1988) (Garth, J., dissenting) (disagreeing "with the majority's holding that a suicide

without police assistance, involvement, or encouragement, may give rise to a constitutional violation").[9]

At bottom, the court of appeals has endorsed a constitutional claim for failure to provide proper *custodial* care rather than proper medical care.[10] The issue if not resolved now will impose significant costs on state and local governments. If a constitutional duty exists to protect detainees in custody from themselves, then the natural tendency of plaintiffs will be to attempt to expand that duty. Thus, in this case respondents introduced expert testimony that it was negligent not to have suicide-proof facilities and not to have expensive monitoring equipment. See App. 6a.[11] No state or local entity faced

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[9] Other federal appellate decisions have recognized constitutional claims against public officials for failure adequately to protect persons from suicide. See *Lewis* v. *Parish of Terrebonne*, 894 F.2d 142, 145 (5th Cir. 1990) (claim that defendant was deliberately indifferent to suicidal detainee's "serious medical needs"); *Burns* v. *City of Galveston*, 905 F.2d 100, 103 (5th Cir. 1990) (failure to take steps necessary to protect against detainee's suicidal tendencies "may constitute a constitutional due process violation"); *Greason* v. *Kemp*, 891 F.2d 829, 835-36 (11th Cir. 1990) (prison officials have constitutional duty to take steps to prevent suicide of inmate who has threatened suicide); *Colburn* v. *Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988) (constitutional liability not precluded merely because inmate is injured by own self-destructive behavior); *Partridge* v. *Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986) (Wisdom, J.) ("failure to take any steps to save a suicidal detainee from injuring himself may also constitute a due process violation").

[10] The Fourth Circuit's reliance on the *Estelle-Youngberg* line of cases, which hold that the government has a constitutional obligation to provide *medical care* to prisoners and detainees, is misplaced. The decision below—that petitioners had an affirmative duty to provide conditions of custody that would protect Buffington from himself—gives rise to a broad constitutional duty to maintain certain conditions of custody, rather than a more narrowly focused and discrete obligation to provide necessary medical care and other "basic human needs." See *DeShaney*, 489 U.S. at 200.

[11] Plaintiffs' expert witness testified at trial that suicidal detainees should be screened by "health trained staff" and constantly

with the holding that due process requires affirmative protection can ignore the possibility that failure to implement expensive means of preventing suicide may create significant exposure to six-figure damage claims and even larger claims for attorneys fees in federal courts.[12] See *supra* page 4 and note 4. Because the recognition of such a duty substantially affects the balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984), this Court should grant the petition and review the decision below.

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observed. 1/9/89 Trial Tr. at 530, 609 (testimony of Joseph R. Rowan). According to this expert, architectural changes to jail and detention facilities—including remodeling and removal of all fixtures—are required to render these facilities suicide-proof. 1/9/89 Trial Tr. at 546-49.

[12] The decision below also seriously affects the scope of constitutional liability in connection with the provision of other governmental services, such as police protection, foster care and rescue services. See, *e.g.*, *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 699-700 (9th Cir. 1990) (no due process violation where police failed to protect victim from husband, despite knowledge of risk of harm); *Milburn* v. *Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 476-78 (4th Cir.) (no due process violation for harm inflicted by foster parents), *cert. denied*, 110 S. Ct. 148 (1989); *Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (reversing dismissal of due process claim where county prevented city police from attempting to rescue drowning child).

Moreover, the issue raised in this petition is a recurring one; the number of cases decided by the courts of appeals on this issue reflects the frequency with which the issue arises. See pages 11-12 and note 9 *supra*; see also *Bell* v. *County of Washington*, 741 F. Supp. 1354 (S.D. Iowa 1990); *McDay* v. *City of Atlanta*, 740 F. Supp. 852 (N.D. Ga. 1990); *Hamlin* v. *Kennebec County Sheriff's Dep't*, 728 F. Supp. 804 (D. Me. 1990); *Simmons* v. *City of Philadelphia*, 728 F. Supp. 352 (E.D. Pa. 1990); *Rellergert* v. *Cape Girardeau County*, 724 F. Supp. 662 (E.D. Mo. 1989); *Snyder* v. *Baumecker*, 708 F. Supp. 1451 (D.N.J. 1989). The number of reported decisions also ensures that the Court will have the benefit of a wide range of legal opinions.

B. As the previous discussion of the Sixth Circuit's decision in *Danese* makes plain, respondents' federal claim against petitioners should have been dismissed as barred by qualified immunity. Even if due process does create a constitutional duty to prevent a suicide, it clearly was not a duty so firmly established in 1987 that liability can be imposed for breach of that duty by these officers. At a minimum, any holding that they lacked immunity as a matter of law would directly conflict with the decision in *Danese* and would be impossible to square with this Court's holdings outlining the basic legal standards for immunity in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The court of appeals' refusal to consider petitioners' qualified immunity defense directly conflicts with the decision of the Seventh Circuit in *Rakovich* v. *Wade*, 850 F.2d 1180, 1204 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988). In *Rakovich* v. *Wade*, a Section 1983 action, the Seventh Circuit held that the doctrine of qualified immunity is a legal question that requires an appellate court to undertake "application of the correct legal theory." 850 F.2d at 1204. Although the defendants in *Rakovich* had "presented the district court with the incorrect case law on the qualified immunity issue," the court of appeals was "[n]ot bound by the officers' incorrect citation of the law." *Id.* Rather, the court held that "the correct law must be applied whether properly raised by the parties or not." *Id.* at 1203. The Court decided that the officers had raised the qualified immunity issue in a motion for a directed verdict and that, under the correct standard, the officers were immune from liability. *Id.* at 1204.[13] In so holding, the Court in

[13] The Fourth Circuit's finding of waiver on this record is also inconsistent with the decisions of other courts holding that waiver of an appellate issue should not be lightly inferred even though an argument might have been better articulated. See *United Transp. Union* v. *Dole*, 797 F.2d 823, 827 (10th Cir. 1986) ("Even though UTU should have developed the issue in a more thorough and in-depth fashion in its appellate brief, we hold that UTU did not abandon the issue for our review"); *Shirey* v. *Devine*, 670 F.2d

Rakovich was faithful to the vital purpose of the qualified immunity doctrine as embodied in Section 1983.

By contrast, the Fourth Circuit in this case found that petitioners had "waived" their qualified immunity defense by not sufficiently articulating the argument in the opening appellate brief. App. 12a-15a. Criticizing petitioners' crafting of the qualified immunity defense, the Fourth Circuit refused to rely upon the argument as set forth in the reply brief and at oral argument. *Id.* at 13a. Most important, the Fourth Circuit failed to consider whether the unique role of qualified immunity—which provides an entire defense to *suit*, not merely to liability (see *Davis*, 468 U.S. at 190)—affects the waiver analysis.[14]

The court of appeals' refusal to consider the qualified immunity issue seriously undermines this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). A finding of waiver on this record is unfaithful to the recognized purpose of qualified immunity—"to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson*, 483 U.S. at 646 (quoting *Davis* v. *Scherer*, 468 U.S. at 195); see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity

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1188, 1191 n.7 (D.C. Cir. 1982) (appellate court may consider issue that was omitted from statement of issues but was discussed in footnote in opening brief, in reply brief, during oral argument and in requested supplemental briefs); see also *Federal Savings & Loan Ins. Corp.* v. *Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987) ("[b]riefs are read liberally to ascertain the issues raised on appeal"); *Atwood* v. *Union Carbide Corp.*, 847 F.2d 278, 280 (5th Cir. 1988).

[14] Moreover, the waiver approach by the court of appeals unduly and unnecessarily prejudiced petitioners by depriving them of their defense. Because the issue of qualified immunity is a question of law, the court of appeals could have ordered supplemental briefing by the parties (if necessary) rather than finding that the defense had been waived by "inadequate" presentation in the opening brief. See *Shirey* v. *Devine*, 670 F.2d at 1191 n.7 (court requested supplemental briefs).

is unique because it entitles public official to "*immunity from suit* rather than a mere defense to liability" and thereby entitles a defendant "not to stand trial or face the other burdens of litigation").[15] The Fourth Circuit's "waiver" determination entirely overlooks the principle that, as a legal question, the doctrine of qualified immunity should be reviewed *de novo* by an appellate court. Because the availability of immunity should not depend upon the vagaries of counsel's briefing style, this Court should grant review to resolve the conflicting treatment of the qualified immunity issue in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1991

[15] Other courts of appeals have recognized the important role of qualified immunity in the functioning of government by according this defense special status and requiring plaintiffs to overcome this defense with a heightened pleading burden. See, *e.g.*, *Siegert* v. *Gilley*, 895 F.2d 797 (D.C. Cir.), *cert. granted*, 111 S. Ct. 292 (1990).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-1161, 89-1021, 89-1040,
89-1054 and 89-1055

BARBARA BUFFINGTON, Individually and as Personal Representative of the ESTATE OF JAMES E. BUFFINGTON, deceased; DAVID M. BUFFINGTON, Individually,
Plaintiffs-Appellees,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,
Defendants-Appellants,

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L.S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,
Defendants.

IN RE JOHN A. AUSTIN; JAMES G. BEACH, III,
Appellants.

BARBARA BUFFINGTON, Individually and as Personal Representative of the ESTATE OF JAMES E. BUFFINGTON, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L.S. HARVEY, Individually and in his official capacity; DONALD GAIGALAS, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants.

Argued Jan. 8, 1990

Decided July 31, 1990

As Amended Sept. 19, 1990

Carter G. Phillips, Sidley & Austin, Washington, D.C.; Robert Belknap Green, Irwin, Kerr, Green, McDonald & Dexter, Baltimore, Md., argued (Mark D. Hopson, Kevin L. Kimball, Sidley & Austin, Washington, D.C., Charles M. Kerr, Irwin, Kerr, Green, McDonald & Dexter, Baltimore, Md., Arnold Jablon, County Atty., Michael J. Moran, Asst. County Atty., Thomas K. Farley, Asst. County Atty., Baltimore County Office of Law, Towson, Md., on brief), for appellants.

William Francis Gately, Daniel Warren Whitney, Sr., Semmes, Bowen & Semmes, Baltimore, Md., argued

(Janet M. Truhe, Semmes, Bowen & Semmes, Baltimore, Md., on brief), for plaintiffs-appellees.

Before PHILLIPS and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PHILLIPS, Circuit Judge:

Baltimore County, Baltimore County Chief of Police Cornelius Behan, and Baltimore County Police Officers Donald Gaigalas and Ronald Tucker appeal the district court's judgment for David and Barbara Buffington in the Buffingtons' action under 42 U.S.C. § 1983 and state law, asserting the defendants' liability for failing to prevent the Buffington's son's suicide while he was being held in a county jail. The appellants also challenge separate orders of the district court awarding attorneys' fees to the Buffingtons and imposing civil contempt sanctions on their trial counsel. We affirm the judgments against Tucker and Gaigalas, reverse the judgments against Behan and Baltimore County, vacate and remand the award of attorneys' fees and expenses, and vacate and remand the contempt sanctions.

I

At about 4:30 a.m. on March 19, 1987, David Buffington, Jr., was awakened by the sound of his father's car pulling out of the driveway of his parents' house, next door to his. Knowing that his younger brother, James Buffington, 24, was the only person home that night, and that James did not have a valid driver's license, David rushed next door and discovered a handwritten suicide note and guns missing from his father's gun closet, which had been forced open. David immediately called the police emergency line, then set off in search of his brother. Officer Lewis Harvey of the Wilkens precinct of the Baltimore County Police Department, responding to a broadcast over the police radio describing James as suicidal, went to David's house and met David's

wife, Kathryn, who showed him the suicide note. Kathryn described James' history of emotional problems and drug and alcohol abuse, particularly as a teenager. These problems had led to a number of encounters with the Wilkens precinct police, and in fact Officer Harvey acknowledged to Kathryn that he knew of James' background. Acting Shift Lieutenant Joseph Gribbin soon arrived at the house and also read the note. Officer Harvey called the Wilkens station and advised that James was suicidal and armed.

The county police apprehended James at 5:47 a.m. When he was seized, James appeared to be intoxicated and had in his possession two rifles and three handguns, all loaded. At 6:25 a.m., Officer Harvey called Kathryn Buffington and informed her that James had been found and was being held at the Wilkens station in protective custody. He told her that James had said that he had not committed suicide "because he couldn't decide which gun to use." J.A. at 1112. David Buffington returned from his search minutes later and called Officer Harvey to confirm that James was being held and to remind him of James' history of emotional problems. David stressed his sense that James was at extreme risk of committing suicide. Officer Harvey stated that preparations were currently being made to take James to Greater Baltimore Medical Center for an emergency psychiatric evaluation. On Officer Harvey's advice, David decided to press criminal charges against his brother in order to enable the police to hold James in custody in the event that the hospital would not take him on an emergency commitment basis. At the time he spoke to David, Officer Harvey had already prepared the paperwork for arrest and charging.

From the time he was first brought into the station, Buffington was handcuffed to a rail beside the booking desk in the receiving room of the police station so he could be observed by the desk officers. Several police officers testified at trial that it was standard practice to

handcuff suicidal detainees to the rail by the booking desk rather than place them in the lockup, where they might be able, quietly and unnoticed, to hang themselves. *See, e.g.*, J.A. at 1160-63 (testimony of Officer Harvey). At approximately 6:15 a.m. that morning, Officers Donald Gaigalas and Ronald Tucker had taken over as desk officers, relieving Officers William Maeser and Patrick Kamberger from that post. Officer Gaigalas, at about 6:25 a.m., unhitched Buffington from the rail and took him to an isolation cell, without removing any of his clothing. Although there were numerous detainees in the male lockup, Gaigalas placed Buffington alone in the female lockup area, and made no provision to keep him under observation. At 7:15 a.m., Buffington was found, hanged from the cell's horizontal bars by a noose fashioned from his pants.

David and Barbara Buffington, as James' parents, and Barbara as James' personal representative, then brought this action alleging claims of constitutional violation under 42 U.S.C. § 1983, and pendent state claims under the wrongful death and survival statutes. Named as defendants were Baltimore County, Chief of Police Cornelius Behan, Sergeant Daniel Yuska, Corporal Joseph Gribbin, Captain Kenneth Kramer, and Officers Lewis Harvey, Donald Gaigalas, Ronald Tucker, and William Maeser.

There was conflicting evidence at trial about Buffington's emotional state while handcuffed to the rail and about how much the desk officers knew concerning Buffington's intention to commit suicide. Outgoing desk officer Kamberger testified that Buffington told him that he wanted to shoot himself, and Kamberger further stated that he passed this information on to Officer Tucker when Tucker and Gaigalas took over at the desk. J.A. at 1357-60. Tucker denied that Kamberger told him this. J.A. at 1391. Officer Gaigalas admitted that he knew Officer Harvey was preparing forms for Buffington's

emergency commitment. J.A. at 1412. Though he later equivocated on the point, Gaigalas admitted in original testimony that he knew Buffington was suicidal before he took him to the cell. J.A. at 1407-08. Gaigalas also admitted that a prior deposition statement that he did not know that Buffington was suicidal and was being held for emergency psychiatric treatment had been "deliberately and knowingly false." J.A. at 1406.

At trial, the Buffingtons presented expert testimony about the County's deficiencies in suicide prevention at correctional facilities. Since 1977, there had been 57 suicide attempts in the County jails, twelve of which had been "successful." Although the County had adopted in 1984 one of the nationally recognized suicide prevention standards, known as "CALEA" (Commission on Accreditation for Law Enforcement Agencies), it did not have any written policies or regulations implementing the standards. As noted, however, the department's officers did operate under a "standard order" that suicidal detainees should remain handcuffed to the rail by the front desk. The evidence at trial also showed that County police officers received no training in identifying suicidal detainees and in preventing suicide attempts. J.A. at 1627. Dr. Joseph Rowan, one of the Buffingtons' experts on jail and lockup suicide prevention, testified that "I strongly feel that this is the worst case of handling of a suicide case that I have ever seen." J.A. at 1662-63.

After a first trial ended in mistrial, a second jury found Officers Tucker and Gaigalas liable under § 1983 for deliberate indifference to Buffington's serious need for some measure of suicide prevention. The County, through its policymaker Chief Behan, and Behan himself were found liable under § 1983 on the theory that their failure to train county police officers in suicide prevention evidenced a deliberate indifference to the rights of suicidal detainees. The jury awarded a total of $185,000 in dam-

ages against the appellants.[1] Following denial of the defendants' motions for j.n.o.v. and alternatively for a new trial, the court awarded over $430,000 in attorneys' fees and costs to plaintiffs. The court also found that the defendants' attorneys' failure to produce some crucial witnesses' statements was a knowing concealment under Fed.R.Civ.P. 26(e)(2)(B), and held them in civil contempt, ordering them to pay the court almost $7,000 each.

These appeals followed.

By way of preview, in Part II we address all the appellants' challenges to the existence of any constitutional right for whose violation they could be found liable on the § 1983 claims. In Part III, we consider whether Officers Tucker and Gaigalas have raised a separate issue of their qualified immunity from § 1983 liability. Although the judgment against Tucker and Gaigalas is supported independently by the jury's finding of liability on the state law claims, Parts II and III are necessary because Tucker's and Gaigalas' liability under § 1983 has important ramifications for the award of attorneys' fees. In Parts IV and V, we address the judgments against the County and Chief Behan, respectively, on the § 1983 claims. Parts VI and VII discuss the County's and Behan's separate claims of state law immunity from the state law claims on which they were found liable. Part VIII sets out the facts relevant to the district court's award of attorneys' fees and expenses to the prevailing parties, the Buffingtons, and addresses that award. Finally, Part IX discusses the facts relevant to and reviews the district court's order holding the County's attorneys in civil contempt and imposing monetary sanctions on them.

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[1] The jury did not award recovery on the Buffingtons' claims against the precinct captain and four other police officers and rejected the claim that the County, Behan, and the precinct captain, Kramer, had participated in a conspiracy to cover-up the investigation of the suicide.

II

All the appellants challenge the primary judgments under 42 U.S.C. § 1983 on the ground that the asserted constitutional right to some measure of protection from suicide under these circumstances does not exist. Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide when the state has intervened not to enforce the criminal law, but at the request of family members to protect the person from causing harm to himself. We reject this argument.

For the proposition that Buffington had no substantive due process right to affirmative aid from the state, the appellants rely primarily on *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In *DeShaney*, the Supreme Court held that the substantive component of the fourteenth amendment's due process clause creates no affirmative obligation on the state to protect individuals from "private violence." *Id.* at 1004. The petitioners in *DeShaney* argued that it violated substantive due process for state social workers to fail to protect a child from physical abuse at the hands of his father when the workers knew of the abuse but "stood by and did nothing." *Id.* at 1007. The Court rejected the petitioners' contention, reasoning that, as a general matter, the due process clause is "not . . . a guarantee of certain minimal levels of safety and security," *id.* at 1003; it is only after the state has taken custody of a person that the due process clause imposes certain affirmative obligations of care on the state. *Id.* at 1005; *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (eighth amendment, applicable to states through the fourteenth amendment's due process clause, requires state to provide adequate medical care to prisoners where failure to do so would amount to deliberate indifference to serious medical needs); *Youngberg*

v. Romero, 457 U.S. 307, 319, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28 (1982) (fourteenth amendment's due process clause requires state to provide involuntarily committed mental patients with "minimally adequate or reasonable training to ensure safety and freedom from undue restraint"); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (fourteenth amendment's due process clause requires state to provide medical care to injured suspects in police custody). Because the child in *DeShaney* was still in the custody of his natural father—in "the free world"—the state was under no affirmative obligation enforceable through the due process clause to protect him.

The appellants argue that under the rationale of *DeShaney*, there was no affirmative duty of care on the part of any state actor in this case because the intervention to protect Buffington was at the instance of private parties. This is a misreading of *DeShaney*. Distinguishing prior cases in which it had found affirmative constitutional duties of protection from the situation in *DeShaney*, the Court explained that in those earlier cases it was the fact of state *custody* that triggered at least some duty of care on the part of the state:

> [W]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs —e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id., 109 S.Ct. at 1005-06 (citations omitted). Nothing in the Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody. Such duties have been found both where the state takes custody inci-

dent to enforcement of its criminal laws, *see Estelle*, 429 U.S. 97, 97 S.Ct. 285, and *Revere*, 463 U.S. 239, 103 S.Ct. 2979, and where the custody serves civil, regulatory purposes, *see Youngsberg*, 457 U.S. 307, 102 S.Ct. 2452. Nor do we read *DeShaney* or the other cases as implying that it is relevant to the existence of the duty whether a state or private actor brought the need for custody to the state's attention. *See Youngberg*, 457 U.S. at 309, 102 S.Ct. at 2454 (involuntarily committed mental patient's mother sought son's commitment because she was unable to care for him or control his violence). In short, we see no basis for adopting the categorical rule urged by appellants that the state owed no duty of care to Buffington under the circumstances of this case. We hold that the due process clause did impose an affirmative obligation on the state to provide some measure of care here.

That leads to the question of the nature of the duty owed. The district court instructed the jury that it could find the individual officers liable under 42 U.S.C. § 1983 for their deprivation of a constitutionally protected liberty interest if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nonetheless acted with deliberate indifference in failing to take any steps to prevent the suicide. The court noted, however, liability could not be premised on a finding that these officers failed to act on a speculative suicide risk—by not screening for suicidal tendencies or taking other preventive measures—if they had no knowledge that Buffington was suicidal. This instruction defined the duty in terms of the recognized duty of care owed to pretrial detainees, and we think this was proper.

The due process clause guarantees a pretrial detainee the right to adequate medical care at least where the state's failure to provide such care would amount to deliberate indifference to a serious medical need. *See Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir.1988) (noting that the precise scope of the pretrial detainee's right to medical

care is uncertain but is at least as great as a convicted prisoner's eighth amendment right under *Estelle v. Gamble* to be free from "deliberate indifference" to "serious" medical needs). A serious psychological impairment can qualify as such a medical need. *See, e.g., Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir.1977); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir.1986); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

More narrowly, we have recently recognized that where police know that a pretrial detainee is on the verge of suicide, that psychological condition can constitute the kind of serious medical need to which state officials must, under the due process clause, not be deliberately indifferent. In *Belcher v. Oliver*, 898 F.2d 32 (4th Cir.1990), we found no due process violation where a pretrial detainee hung himself with his belt after police officers placed him in a jail without removing his belt or shoes. Because the plaintiff in *Belcher* had presented "no objective evidence that [he] even had a serious need for such attention . . . [to] suicidal tendencies," *id.* at 35, we held that he had not stated a claim for a violation of his substantive due process rights. In *Belcher*, we declined to impose on the police officers a duty to screen detainees for suicidal tendencies, but we did not imply that officers would have had no constitutional duty at all if they demonstrably knew or had reason to know that a suicide was imminent. Other courts of appeals have recognized this distinction and the viability of a claim for official indifference to known suicidal tendencies. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir.1988) ("custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide [but] if such officials know or should know of the particular vulnerability to suicide of an inmate," fourteenth amendment imposes duty not to act with "reckless indifference" to the risk); *Danese v. Asman*, 875 F.2d 1239, 1244 (6th Cir.1989) (no duty to screen pretrial detainee for suicidal tenden-

cies, but "[t]he story might be different if the police were certain that [the detainee] would attempt suicide and just ignored it").

Whether or not the court's characterization of Buffington in the instruction as a "pretrial detainee" was strictly accurate—and we note that evidence that backup criminal charges were in place in the event Buffington could not be admitted to the hospital supports the court's characterization—it was not plain error for the court's instruction to describe the substantive due process protection he enjoyed as coextensive with that afforded a pretrial detainee. Put another way, the appellants have not suggested, and we cannot conceive of, any reason why the Constitution might forbid deliberate indifference to the serious medical needs of pretrial detainees but permit such indifference to the needs of one in custody pending emergency psychiatric care.

III

We next consider a worrisome problem arising from the confused litigation position taken by the individual officers respecting their possible entitlement in any event to qualified immunity from the § 1983 claims. Part II of the appellants' brief mentions qualified immunity for the officer-defendants, but hinges the argument wholly on the lack of a constitutional violation—it does not assert that these defendants were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. The full text of this argument states:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which

> did not exist. Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

Brief of Appellants at 16-17 (citations omitted). Even under a generous reading of this argument, it does no more than assert that these individual defendants were entitled to qualified immunity because, *on the merits*, there was no constitutional violation. While the appellants' reply brief might be read as raising a distinct issue of qualified immunity, we decline to give the appellants the benefit of such a liberal reading. *See* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 228.02[2.-1] (1990) (appellant must raise all issues he wishes to be considered in his initial brief); *Mississippi River Corp. v. FTC*, 454 F.2d 1083, 1093 (8th Cir.1972) (error relied on should not be asserted for the first time in the reply brief).

We think this is the proper disposition for at least two reasons. The Buffingtons understandably did not think that the individual defendants had raised the distinct contention that they were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. Perceiving that the qualified immunity argument was simply a reformulation of these defendants' argument on the merits, the Buffiington's responded accordingly in Part II of their brief. The full text of that argument states: "Appellants next argue that '[a]bsent a constitutionally secured right, . . . the state officer may assert and prevail upon the doctrine of qualified immunity.' Appellants, however, have failed to establish the absence of such a right. Thus there is no basis for asserting this defense." Brief of Appellees at 32. In other words, the Buffingtons justifiably interpreted the qualified immunity issue raised by these defendants as simply duplicative of the merits issue, and so addressed only the merits.

More generally, the appellants' presentation of the qualified immunity defense throughout this litigation has been a chronicle of confusion and misapprehension. In their first responsive pleading, a motion to dismiss or for summary judgment, the appellants as defendants asserted "[t]hat the individual Defendants are immune with respect to the claims presented in the within Complaint." J.A. at 116. In their supporting brief, they argued that the plaintiffs had not alleged a violation of a clearly established constitutional right, because the defendants had no duty to screen for latent suicidal tendencies, as alleged. Finding that the plaintiffs had plainly alleged more than a failure to screen for latent tendencies, the court denied the motion in a memorandum and order. After denial of a motion to reconsider, the defendants sought an amendment to the court's interlocutory order to certify other questions for immediate appeal under 28 U.S.C. § 1292(b). Over a week after that motion was denied, and about a week before trial, the defendants noted an appeal from the denial of qualified immunity under 28 U.S.C. § 1291, *see Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and moved for a stay of the impending trial. The district judge denied that motion, and Judge Winter, in chambers, also denied a motion for stay directed to him. Both judges found that the defense of qualified immunity had not been raised, and Judge Winter opined further that in any event he thought the defense inapplicable. From all indications in the record, that appeal of the qualified immunity issue was thereafter abandoned and, on the first day of trial, the defendants filed an answer to the plaintiffs' amended complaint and finally included good faith qualified immunity as a defense distinct from the constitutional violation.

The first trial ended in a mistrial because of a hung jury. At the close of evidence in the second trial, the defendants moved for directed verdict. The court re-

served its ruling on that motion and submitted the case to the jury. The defendants requested an instruction on qualified immunity, which the court refused to give for reasons not contained in the record. The defendants/appellants have not on appeal assigned error to that refusal. After the jury returned verdicts under § 1983 against some of the individual defendants, those defendants moved for j.n.o.v., asserting, *inter alia*, in the motion itself that they were entitled to qualified immunity. In their supporting brief, however, they made no argument whatsoever on this point and made no mention of the refusal to instruct on qualified immunity. As with the refusal to give the qualified immunity instruction, the appellants have not on appeal assigned error to the denial of the motion for directed verdict or j.n.o.v.

In sum, we do not think the appellants have properly preserved and raised in this court an issue of qualified immunity distinct from the question of whether a constitutional violation occurred. We decline to consider such an issue *sua sponte*.

IV

Appellant Baltimore County argues separately that it was entitled in any event to judgment as a matter of law on the § 1983 claim against it. Specifically, the County contends that the district court erred in submitting that claim to the jury because there was no evidence that its failure to train its officers in suicide prevention proximately caused Buffington's suicide. We agree that under the Supreme Court's decision in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the judgment against the County on the § 1983 claim must be reversed.

In *Canton*, the Supreme Court outlined the circumstances under which a municipality can be held liable under § 1983 for constitutional violations resulting from a policy of failing to train municipal employees. Under

general principles of § 1983, a municipality can be liable only when the municipality itself, through one of its policies or customs, causes the constitutional violation; municipal liability cannot be premised on *respondeat superior* or vicarious liability. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 2036-37, 56 L.Ed.2d 611 (1978). Moreover, the municipal policy or custom must be the direct cause of—the "moving force" behind—the constitutional violation. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981). The *Canton* Court, addressing the peculiar context of a claim that a municipality's policy of omission, *i.e.*, its failure to train, was the cause of the constitutional violation, considered both the degree of fault and the causal link required under § 1983 to sustain that type claim.

The Court held first that § 1983 requires a showing that the failure to train amounts to "deliberate indifference to the rights of persons with whom the police come in contact." [2] *Canton*, 109 S.Ct. at 1204. This degree of fault was thought necessary to reconcile the failure-to-train theory of liability, which alleges a policy of omission, with the principle that § 1983 municipal liability can attach only when the municipality's policy represents "a deliberate choice [by the municipality's authorized policymakers] to follow a course of action . . . made from among various alternatives." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986) (Brennan, J., plurality opinion). In addition to the "deliberate indifference" culpa-

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[2] This requirement of "deliberate indifference" arises under § 1983 itself and stands independent of any culpability requirement that may be necessary to prove the underlying constitutional violation. *Canton*, 109 S.Ct. at 1204 n. 8. This does not of course displace the firmly established rule that § 1983 contains no independent state-of-mind requirement governing the liability of the immediate wrongdoer. *See Graham v. Connor*, —— U.S. ——, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989).

bility standard, the Court explained that a direct causal link must exist between a specific deficiency in training and the particular violation alleged: "the identified deficiency in [a] training program must be closely related to the ultimate injury." *Canton*, 109 S.Ct. at 1206. The pertinent question on causation will be "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id.* It will not

> suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.

Id.

We do not think the evidence was sufficient under *Canton* to permit a jury to find that a policy of failure to train officers in suicide prevention actually and proximately caused the particular harm that occurred here. Immediately before the suicide, Buffington was handcuffed to the rail by the precinct's booking desk, in conformance with the standard procedure used as a matter of policy for suicidal detainees at the precinct. Buffington would have remained handcuffed there until moved to the hospital but for desk officer Gaigalas's decision, unchecked by his fellow desk officer Tucker, to take him to an isolation cell without removing any of his clothing, arranging for monitoring, or taking some other preventive measure. It may well be, as the Buffingtons contend, that better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or some combination of these would have served to avoid what occurred here. But *Canton* has made clear that municipal liability under § 1983 may not rest on such

proof. *Id.* 109 S.Ct. at 1206. This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail, *i.e.*, by showing more than the deliberate indifference that the jury found.[3] In so holding, we need not determine whether the Wilkens precinct's standards and procedures for handling suicidal detainees necessarily met constitutional standards in all possible respects. Rather, in light of *Canton*'s instruction on causation, we hold only that the normal practice of handcuffing such detainees to the rail, which was a part of those procedures, was "sufficient to equip [Gaigalas and Tucker] to avoid the particular injury causing conduct" in this case. *Canton*, 109 S.Ct. at 1206; *see Dorman v. District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989) (reversing § 1983 judgment against District of Columbia for failure to train in suicide prevention on grounds that *Canton*'s fault and causation standards were not met).

V

The judgment against Chief Behan under § 1983 must also be reversed. Behan may not be held liable for § 1983 violations for the acts of Officers Gaigalas and Tucker under a theory of *respondeat superior*. *See Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir.1977).

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[3] Indeed, the district court has held and the Buffingtons themselves, in their appellate brief, have acknowledged that it was Gaigalas's critical dereliction that directly caused this suicide. The court stated that it was not "necessary for the police officers at Wilkens Police Station to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated jail cell with his pants on. A semi-clear head and a normal degree of common sense would have sufficed." J.A. at 964-65. Similarly, the Buffingtons' statement of facts notes that "[t]his suicide was the direct, proximate, and inevitable result of the utter failure of Gaigalas and Tucker to constantly observe James while he was in their custody." Brief of Appellees at 10.

Here, the theory of Behan's individual liability alleged and submitted to the jury was that he had authority for implementing training or other suicide prevention standards and failed to do so, directly and proximately causing Buffington's suicide. For the reasons stated in the preceding section, there was insufficient evidence that any failure to train on Behan's part caused this particular injury.

VI

The County next contends that the district court erred in holding it liable for the state law negligence claims for wrongful death and survival because Baltimore County has never waived its governmental immunity. The district court denied the County's motion for j.n.o.v. on this ground, reasoning that the County's creation of a self-insurance fund constituted a limited waiver of governmental immunity. We agree with the County that its adoption of a self-insurance fund did not operate to waive the County's governmental immunity and that the judgment against it on the state claims must therefore be reversed.

As a "home rule" county chartered under Article XI-A, § 2, of the Maryland Constitution, Baltimore County may exercise only the powers granted to such counties in the Express Powers Act, Md.Ann. Code Art. 25A (1987).[4] One such express power the County possessed at the time relevant to this case was the power to waive its governmental immunity.[5] In 1977, the County created a self-

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[4] Md. Const. art. XI-A, § 2 (1981), provides: "The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article." Pursuant to this mandate, the General Assembly enacted the Express Powers Act.

[5] Section 5(CC) of the Express Power Act authorized a charter county

> [t]o provide by ordinance or inclusion in the county charter for the waiver of sovereign immunity so that the county may be

insurance fund designed, among other things, "to pay on behalf of the county [and its employees] . . . any sum which the county [and its employees] may become legally obligated to pay for liability claims, including but not limited to personal injury and/or property damage." Baltimore County Code, § 2-131(b). The question is whether Maryland law would view this legislative action as a waiver of the County's governmental immunity.

Under Maryland law, a court may find a waiver of sovereign or governmental immunity only if "positive consent given, or by necessary or compelling implication." *Jackson v. Housing Opportunities Comm'n*, 289 Md. 118, 422 A.2d 376, 378 (1980).[6] Maryland uses a two-pronged test for determining whether the relevant legislature, be it the state's General Assembly or a county governing body, has waived sovereign or governmental immunity: "[a]n asserted waiver of immunity is ineffective 'unless specific legislative authority to sue the agency [or municipality] has been given, and unless there are funds available for the satisfaction of the judgment, or power reposed in the agency [or municipality] for the raising of funds necessary to satisfy a recovery against it.'" *Jackson*, 422 A.2d at 378-79 (quoting *Katz v. Washington*

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sued in tort actions in the same manner and to the same extent that any private person may be sued. Any chartered county [that so provides] shall carry comprehensive liability insurance to protect itself, its agents and its employees.

Md.Ann.Code Art. 25A, § 5(CC) (1987). The General Assembly has now repealed this subsection and all waivers enacted under it. Acts 1987, ch. 594, § 2. This repeal, however, is irrelevant to the waiver issue here, because the repeal applies only to actions arising on or before July 1, 1987. *Id.* § 3.

[6] Though the Maryland cases have frequently used the terms interchangeably, "sovereign" immunity refers to the tort immunity of the State and its agencies, which is total, while "governmental" immunity refers to the immunity of counties and municipalities, which turns on whether the suit is based on "governmental" or "proprietary" functions; tort immunity exists, unless waived, in the former case, but not in the latter.

Suburban Sanitary Comm'n, 284 Md. 503, 397 A.2d 1027, 1033 (1979)). Both prongs of this test must be satisfied. *Id.* at 422 A.2d at 378-80. The general rule in Maryland is that the mere procurement of liability or indemnity insurance by a governmental unit has no effect on its immunity from tort liability. *See id.* at 380; *Quecedo v. Montgomery County*, 264 Md. 590, 287 A.2d 257, 260 (1972); *Jones v. Scofield Bros.*, 73 F.Supp. 395, 398 (D.Md.1947).

The first prong of the waiver test is not met in this case, because the County has never consented to be sued. The provision for self-insurance cannot by itself support a finding of such consent. *Jackson*, 422 A.2d at 380. In the Maryland cases where waiver has been found, the legislative intent that a county or a state agency may be sued has been expressed in explicit and unmistakable language. *See, e.g., James v. Prince George's County*, 288 Md. 315, 418 A.2d 1173 (1980) (tracking language of Express Powers Act, county's charter provided "[t]he County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued"); *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 397 A.2d 1027 (1979) (state agency "shall be a body corporate . . . with the right . . . to sue and be sued"); *cf. O & B, Inc. v. Maryland-Nat'l Capital Park and Planning Comm'n*, 279 Md. 459, 369 A.2d 553 (1977) (legislative authorization that state agency may "sue and be sued" is not alone sufficient to find waiver of sovereign immunity). Nowhere in the language of § 2-131 has Baltimore County expressly authorized that suits may be brought against it, and the creation of the self-insurance fund cannot take the place of the necessary legislative authorization.

The district court believed that a county would not create an insurance fund to pay claims for which it might become liable unless it intended thereby to waive its immunity from all claims. This analysis is flawed in at

least two respects. First, the district court, quoting *Jackson*, 422 A.2d at 382, stated that "a legislative mandate to carry liability insurance is a strong indication of legislative intent that sovereign immunity is waived to the extent of the insurance." On that basis, the court found that the County had effected "a limited waiver of sovereign immunity." [7] This reasoning, however, ignored the context of the Court of Appeals' statement in *Jackson*. In that case, the court had already concluded that the first prong of the immunity waiver test was satisfied by language in Md.Ann.Code Art. 44A, § 8(a) stating that the housing authority has power "[t]o sue and be sued." *Id.* 422 A.2d at 379. The quoted language from *Jackson* was stated in the context of considering whether, notwithstanding the express provision for suits, the particular insurance provision in that case sufficed under the second prong of the waiver inquiry. *Id.* at 381-82.

Second, the district court's premise that a county would not insure itself unless it had waived its governmental immunity reflects a misapprehension of the nature of the county's pre-existing immunity. Though counties in Maryland are immune, absent waiver, from suits based on actions taken in the exercise of their "governmental" functions, they are not immune from suits alleging conduct in the exercise of "proprietary" functions.[8] *Austin*

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[7] If the district court had been correct that the waiver of immunity accomplished by this enactment was "limited," the waiver would have violated the Express Powers Act. A chartered county's waiver of governmental immunity under that Act is ineffective if "limited." *See Prince George's County v. Fitzhugh*, 308 Md. 384, 519 A.2d 1285 (1987).

[8] The Buffingtons have not argued that the County's conduct in this case could qualify as a "proprietary" function, and we express no opinion on the proper characterization. *See Austin*, 405 A.2d at 272 (distinction between "governmental" and "proprietary" functions "is probably one of the most unsatisfactory known to the law" (quoting 3 K. Davis, Administrative Law Treatise, § 25.07, at 460 (1958)).

v. City of Baltimore, 286 Md. 51, 405 A.2d 255, 256 (1979). It would certainly be permissible to infer that the County's creation of the self-insurance fund was motivated by a need to fund liabilities arising from suits based on "proprietary" functions. This inference is supported by the fact that the County enacted § 2-131 under the express power conferred by Md.Ann.Code Art. 25A, § 5(S) (1987), which permits amendment of the county charter, rather than under the now-repealed express power in § 5(CC) to waive immunity. In short, apart from its failure to meet the first prong of the immunity test, the provision for the insurance fund, viewed in context, contains no necessary or compelling implication of waiver of governmental immunity.

We hold that Baltimore County was immune from the state law claims alleged in this case and that the judgment against it on those claims must be reversed.

VII

We also agree with Police Chief Behan that the judgment against him on the state law claims for wrongful death and survival must be reversed. The district court erred in denying his motion for directed verdict or j.n.o.v., made on the ground that Maryland law provided him with public official immunity from the state law claims.

A government official in Maryland is entitled to public official immunity if "(1) the individual actor, whose alleged negligent conduct is at issue, is a *public official* rather than a *mere government employee or agent;* and (2) his tortious conduct occurred while he was performing *discretionary*, as opposed to *ministerial*, acts in furtherance of his official duties." *James v. Prince George's County*, 288 Md. 315, 418 A.2d 1173, 1178 (1980) (em-

phasis in original). It is not contested that Behan qualifies as a "public official" under the first prong of the test. *See Duncan v. Koustenis*, 260 Md. 98, 271 A.2d 547 (1970) (among the factors to be considered are whether the individual has ongoing responsibilities, performs an important public duty, and exercises some portion of the government's sovereign power). Rather, the parties disagree over whether the acts subjecting Behan to state law liability were "discretionary" or "ministerial."

The Buffingtons' state law claims against Behan alleged, *inter alia*, that his negligent failure to train, supervise, or otherwise guide the conduct of individual police officers in handling of suicidal detainees caused James Buffington's suicide. Implicit in this allegation, and in the related allegation that Behan was a policymaker for the purposes of imposing § 1983 liability on the County through him, is the recognition that Behan had discretion to implement more effective suicide prevention standards than he did.[9] It is precisely his failure to exercise available discretion that forms the basis of the state law claims against him. This type of failure, however, is the prototypical "discretionary" choice of a policymaking public official that the state law imunity protects. *See Restatement (Second) of Torts* § 895D comment f (1979).

The Buffingtons contend, consistent with the district court's analysis, that because Chief Behan had adopted, at least nominally, the CALEA national standards for jail suicide prevention, his duty to see these standards rigidly maintained involved performance of only a ministerial duty. While it is certainly true that discretion means only the " 'freedom to act according to one's judg-

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[9] Throughout their appellate brief, the Buffingtons ackowledge the breadth of Behan's authority as the police department's policymaker. *See, e.g.*, Brief of Appellees at 15 n. 8 ("Chief Behan has the final say in determining the rules and regulations of the department.").

ment in the absence of a hard and fast rule,'" *James*, 418 A.2d at 1179 (quoting *Schneider v. Hawkins*, 179 Md. 21, 16 A.2d 861, 864 (1940)), the CALEA standards did not have the force of law in Baltimore County and were not binding on Behan's discretion to shape department policy on suicide prevention; indeed, the Buffingtons specifically complain about the *lack* of any written regulations governing suicide prevention. As the official who adopted the CALEA standards, Behan would presumably have had the discretion to modify or even abandon them, at peril, as always, of liability for any resulting violations of federal constitutional rights. As Behan's state law liability was founded on discretionary acts, the judgment against him on the state law claims is reversed.

VIII

The appellants also challenge a separate order of the district court awarding the prevailing plaintiffs $430,658.78 in attorneys' fees and costs under 42 U.S.C. § 1988.[10] Because we have altered the disposition of some of the § 1983 claims, we must remand the award of fees and costs to the district court for reconsideration in light of the Buffingtons' now more limited success. *See Lenard v. Argento*, 699 F.2d 874, 898 (7th Cir.1983). We think it appropriate, however, to discuss some of appellants' specific challenges to the award as it came to us, and some principles of § 1988 fee awards applicable in the present posture of this case, to guide the district court's exercise of discretion on remand. *See id.; Muscare v. Quinn*, 680 F.2d 42 (7th Cir.1982).

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[10] Title 42 U.S.C. § 1988 provides, in relevant part: "In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

A

In their unsupplemented motion for attorneys' fees, the plaintiffs requested that the "lodestar" [11] calculation of the fees for their lawyers—members of the Baltimore firm of Semmes Bowen & Semmes—and two paralegals be made as follows: for lead counsel and senior partner William Gately, 893.7 hours at an hourly rate of $175; for partner Daniel Whitney, 1,150.6 hours at an hourly rate of $135; for associate Janet Truhe, 281.5 hours at an hourly rate of $120; for associate Denise Grieg, 36 hours at an hourly rate of $70; and for paralegals Nancy Kozak and Amy Dagold, 202.4 and 2.6 hours, respectively, both at an hourly rate of $58. The total fee requested under this calculation was $359,918.50. The district court modified this request in only a few minor respects. Though the court rejected challenges to the hourly rates submitted for Gately and Whitney and the paralegals (the rates for Truhe and Grieg were not challenged), it reduced the hours expended. First, it noted 26 billing entries, totalling 4.55 hours, designated "Telephone conversation with judge or judge's staff." The court noted that these conversations were probably with the chambers law clerk, and because, it reasoned, that clerk would not have spoken more than six minutes at any one time, each of the 26 entries should have been for no more than 0.1 hours. The court thus reduced those 4.55 hours to 2.6. J.A. at 936-37. The court also noted that certain of the interrogatories were substantially similar, "which raise[d] the spectre of duplicity [sic]," J.A. at 939, and accordingly reduced the 14.65 hours spent on them to 8. Finally, the court was

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[11] The "lodestar" figure represents "the number of hours reasonbly expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). This figure will normally represent the reasonable fee contemplated by § 1988, though in cases of "exceptional success" an upward adjustment may be appropirate, or in cases of partial or limited success some reduction may be in order. *Id.* at 435, 103 S.Ct. at 1940.

troubled by the numerous billing entries generically describing the billed time, *e.g.*, "legal research regarding substantive issue." Though admitting that the billing sheets gave the court no basis for evaluating the reasonableness of a very substantial portion of the requested hours, it found that "almost all of what counsel did was reasonable" because they "left no stone unturned in proving [the] case and in providing the Court with pertinent authority." J.A. at 944. Nonetheless, the court followed the approach used in *Spell v. McDaniel*, 616 F.Supp. 1069 (E.D.N.C.1985), *aff'd in part, vacated in part*, 824 F.2d 1380 (4th Cir.1987), and made an "across-the-board" 5% reduction in the hours expended on the ground of inadequate documentation. After these modest reductions, the court awarded $340.739.60 of the $359,918.50 sought in this unsupplemented petition. The court also approved all of the $71,513.70 sought as expenses, $39,470.68 of which was spent on four expert witnesses.

The court dealt separately with a supplement to the motion for attorneys' fees covering fees and expenses incurred after the submission of the initial motion. This supplement requested an additional $20,383.48 for work in connection with the response to defendants' motion for j.n.o.v. and the preparation of the fee petition. At the same hourly rates, the court approved Gately's requested 30 hours, but reduced Whitney's 58.6 hours by 10 hours, Truhe's 47.5 by 5% (to 42.75 hours) and paralegal Kozak's 3.3 to 2.3 hours. The resulting reply fee awarded was $17,074.40. The court did not alter the $1,331.08 requested for "reply expenses" of copying, use of Westlaw and Lexis, and word processor time. The total award, after supplementation, of $430,658.78 thus comprised $357,814.00 for attorneys' fees and $72,844.78 for expenses.

B

The most significant issue the district court will have to consider on remand is whether the now unsuccessful

claims against Chief Behan and Baltimore County were sufficiently unrelated to those against the individual officers that the hours expended in pursuit of the former claims must be excluded in the fee award calculation. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983). In *Hensley*, the Supreme Court admonished district courts that where a plaintiff brings in a single lawsuit "distinctly different claims that are based on different facts and legal theories," work on unsuccessful claims cannot be thought to have contributed to the ultimate result and must be excluded from the fee award. *Id.* As discussed, the successful claims against the two individual police officers involved allegations of deliberate indifference to a particular, known, serious need for psychiatric care, and focused exclusively on the officers' conduct at the booking desk in the early morning of March 19, 1987. The ultimately unsuccessful claims against Chief Behan and the County, on the other hand, rested on what appears to us to have been altogether separate conduct—that of failing, over a number of years, to train police officers and equip the Wilkens precinct to handle the recurring problem of suicidal detainees. In other words, the legal theories of a county's custom and policy of indifference to suicidal detainees and the facts needed to prove them might arguably be thought formally unrelated to the facts and theories on which Gaigalas and Tucker were held liable. Nonetheless, we decline to make a first instance assessment of the relatedness of these claims, in light of the Supreme Court's direction that the calculation of a fee award, including questions of the relatedness of multiple claims, lies primarily within the district court's equitable discretion. *Id.* at 436-37, 103 S.Ct. at 1941-42. If the district court determines that the unsuccessful claims against Chief Behan and the County were indeed unrelated to the successful ones, the burden of showing which hours are recoverable for work on the successful claims will of course rest with the fee applicant, and the court is entitled to

expect that the applicant's time records will provide some guidance in identifying the recoverable hours. *Id.* at 437, 103 S.Ct. at 1941 (plaintiff's counsel "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.").[12]

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[12] The appellants object on various grounds to the award of expenses for some of the plaintiffs' expert witnesses. If the district court determines on remand that the claims against Behan and the County were distinct from the successful ones, it should give careful consideration to which, if any, of these experts' expenses should be awarded.

In this connection, we note that the testimony of two of the experts, Joseph Rowan and George Kirkham, appears to have related exclusively to the unsuccessful theory that the police chief's and County's failure to maintain suicide prevention standards was the deliberate indifference that caused the suicide. A third reimbursed expert, Lindsay Hayes, never testified but advised the plaintiffs on the same subject matter. The fourth expert, Robert DiGrazia, a veteran in the field of police administration, testified to the deficiencies in the police's internal "command" investigation of Buffington's suicide. His testimony therefore related to the conspiracy/coverup theory on which the plaintiffs did not prevail at trial. The district court, however, rejected the argument that those particular unsuccessful claims were wholly distinct from the others against the County and Behan and accordingly refused to exclude attorneys' fees and expenses relating to them. Our disposition of the claims against the County and Behan will obviously necessitate reconsideration of the award for DiGrazia's expenses, which related to unsuccessful claims previously found to be intertwined with the now unsuccessful custom and policy claims against the County.

Though the district court should reconsider the relatedness of the claims and the award of expert fees, it need not revisit the argument, correctly rejected by the court and renewed by appellants here, that fees and expenses attributable to the first trial, which ended in mistrial, should be excluded on the ground that the plaintiffs did not prevail in that proceeding. Section 1988 rewards a plaintiff who ultimately prevails—who wins the war—without deducting for lost battles along the way. *See Spell v. McDaniel I*, 824 F.2d 1380 (4th Cir.1987) (approving lodestar that included hours spent on the first trial, even though second trial on damages was granted).

In the event that the district court decides that the unsuccessful claims are "inextricably intermingled" with the successful ones, *see Plyler v. Evatt*, 902 F.2d 273, 280 (4th Cir.1990), the court should undertake a renewed assessment of the "significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Although the court earlier found that the plaintiffs were entitled to a fully compensatory fee because their attorneys achieved an excellent result, this conclusion rested substantially on the judgment that "two of the defendants who lost—Chief Behan and Baltimore County —were the most important." J.A. at 943. We anticipate that, if the court does not determine that the claims against Behan and the County were distinctly different, its assessment of the ultimate result of the litigation will nonetheless be substantially affected by our disposition of those claims. We doubt that, in these changed circumstances, a fully compensatory award would be appropriate, but as with the preliminary question of the relatedness of the claims, the district court should make the judgment on that question in the first instance, with close attention to "the relationship between the amount of the fee awarded and the results obtained," *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941, and the need for a "clear explanation" of that relationship as perceived by the court, *id.*

C

The appellants have also challenged the hourly rates awarded the two lawyers who served as the Buffingtons' lead counsel, David Gately and Daniel Whitney. In the course of reconsidering the fee award on remand, the district court should revisit this challenge, with due regard for the following observations.

As part of his broad oversight of the case, Gately developed the plaintiffs' strategy and tactics, took numerous depositions, and examined most of the witnesses

at trial. Whitney was primarily responsible for pleadings, papers, and legal research, but also handled the presentation of the plaintiffs' expert witnesses and developed the claims against the County and its policymakers. As noted, the court set the hourly rates for Gately and Whitney at $175 and $135 per hour, respectively. Both men were partners in the prominent Baltimore law firm of Semmes Bowen & Semmes and had extensive litigation experience, but no experience in civil rights litigation, apparently having become involved in this case because David Buffington, James' father, was also a partner in that law firm.

The district court should reconsider whether the hourly rates for these attorneys comport with the underlying purpose of the Civil Rights Attorney's Fees Awards Act of 1976, which was to establish a fee-shifting regime that would enable civil rights plaintiffs to gain effective access to the federal courts. *See Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 731 n. 12, 107 S.Ct. 3078, 3089 n. 12, 97 L.Ed.2d 585 ("'[A]n attorney's fee award should be only as large as necessary to attract competent counsel'") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir.1986)). Without implying any impropriety, we think it a relevant inquiry whether but for the unusual circumstance that found the decedent's father a partner in this law firm, these particular lawyers of undoubtedly great general competence would have been retained to handle this action, given their inexperience in the complexities of § 1983 litigation. While there is affidavit evidence that Gately's and Whitney's hourly rates were in line with market rates charged private clients for complex civil litigation in the Baltimore community, the affidavits do not provide specific information about market rates in Baltimore for comparable civil rights cases. *See Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 737 (11th Cir.1988) (noting that the "market rate for federal civil litigation is too overinclusive" for setting hourly rates under § 1988). We

are unable to tell from the district court's memorandum opinion whether the hourly rates for Gately and Whitney were influenced by the fact that, as partners in a leading local firm, they customarily billed at the high end of the private market rates; such a factor would be impermissible under the Supreme Court's direction in *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984), that private firms and nonprofit legal service organizations should be treated equally in setting hourly rates under § 1988. *See Norman v. Housing Authority*, 836 F.2d 1292, 1305 (11th Cir.1988) ("While it is no doubt true that law firms of established lineage and reputation can charge substantial fees, that is not really the question."); *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir.1987) ("there . . . comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries.").

Here, the district court accepted as reasonable under § 1988 the proffered rates that these two skilled attorneys charged in other civil litigation matters. These rates should not have been mechanically accepted in the absence of more specific corroborating evidence of rates charged for civil rights litigation in the Baltimore community. *See Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1161 (8th Cir.1985) (an attorney's own billing rate is not a reliable measure where he does not specialize in the area of law that is the subject matter of the lawsuit). In *Spell v. McDaniel I*, 824 F.2d 1380, 1402 (4th Cir.1987), we noted that hourly rates could be proved by "affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." We did not imply, however, that the rates charged by a private attorney without civil rights ex-

perience could be determinative of a § 1988 hourly rate without some other evidence corroborating those rates as reasonable for § 1983 litigation in the relevant community. The Supreme Court has strongly intimated that the primary justification for awarding high-end hourly rates for experienced counsel in § 1983 litigation is that their very experience and skill will result in economies of time because of their lack of need for extensive background legal research. *Blum*, 465 U.S. at 898, 104 S.Ct. at 1548. Where, as here, counsel is indeed experienced in general but not in the special field of civil rights litigation, that justification may upon careful analysis be found lacking. Here as a matter of fact the record at least suggests the likelihood that an inordinate amount of legal research effort was necessitated by these undoubtedly fine lawyers' lack of specific experience in this field.[13]

In conclusion of this issue, we reiterate that we are mindful of the necessity of—and sound policy reasons for —according substantial deference in § 1988 fee matters to the discretion of the district court, which has "close and intimate knowledge of the efforts expended and the value of the services rendered." *McManama v. Lukhard*, 616 F.2d 727, 729 (4th Cir.1980); *see Hensley*, 461 U.S. at 436-37, 103 S.Ct. at 1940-41. In exercising that dis-

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[13] By way of illustration, we note that the district court credited over 300 hours for legal research performed by two associates who assisted Gately and Whitney. Although the district court observed that this case was largely fact-intensive, it approved the more than 300 hours of associates' research, in addition to the substantial research performed by Whitney, on the ground that "legal research is necessary to master the vermiform aspects of § 1983." J.A. at 939. The district court should reconsider on remand whether these were hours reasonably expended in light of plaintiffs' choice not to retain counsel with experience in civil rights litigation. *Cf. Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939 (counsel for the prevailing party should use the same "billing judgment" he would use in the private sector and "make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."); *Spell v. McDaniel II*, 852 F.2d 762, 768-70 (4th Cir.1988).

cretion on remand, the district court should attend to the informing legal principles on exclusion of hours for unsuccessful distinct claims or reduction based on limited overall success, relevant market hourly rates in civil rights cases, and the attorneys' use of private-sector quality "billing judgment."

IX

Finally, the appellants challenge an order of the district court holding their trial counsel in contempt for violating a court order requiring production of several witness statements. As explained more fully below, the court appointed a private prosecutor after the conclusion of the second trial to investigate the possibility of bringing criminal contempt charges against Baltimore County Attorneys John Austin and James Beach for their refusal to produce certain crucial witness statements. Though the court later denied the private prosecutor's application for a show cause order under Fed.R.Crim.P. 52(b), thus aborting the criminal investigation, it held Austin and Beach in civil contempt and imposed sanctions under Fed.R.Civ.P. 37(b)(2)(D) and the court's inherent authority. The court ordered Austin and Beach each to pay to the clerk of the court $6,785.37, an amount representing a quarter of the costs incurred in the private prosecution. On appeal, the appellants contend that these sanctions were in substance based on a finding of criminal contempt made without the necessary procedural requirements. We agree with the appellants that the order imposing sanctions must be vacated and remanded.

A

In December 1987, shortly after the filing of the complaint, the Buffingtons served on the County a request for production of documents. The following requests are relevant here:

2. Any and all documents concerning or relating to the arrest, booking, detention, and death of James E. Buffington.

3. Any and all documents concerning or relating to any investigation by the Baltimore County Police department as to the death of James E. Buffington.

. . . .

19. Any and all documents concerning or relating to any oral or written statement given by any witness to the arrest, booking, treatment, incarceration, or death of James E. Buffington.

20. Any and all written or recorded statements given by any witness to the arrest, booking, treatment, incarceration or death of James E. Buffington.

21. Any and all documents, reports, and other printed or written materials concerning or relating to each individual who was detained, arrested, or incarcerated at the Wilkens Avenue Police Station lockup facility from 12:01 p.m. on March 18, 1987 through 10 a.m. on March 19, 1987.

J.A. at 979-80.

In a February 17, 1988, order, the district court denied the County's motion for a protective order and ordered production of all requested documents. The County then answered the documents request, stating that it was producing or had already produced all responsive documents and that it "reserve[d] the right to supplement this answer in the event additional documents and/or tangible property requested herein are discovered or becomes [sic] available." J.A. at 459.

Concerned about some evidence presented at the first trial, County Attorney James Beach asked the police department to reopen their earlier command investigation to the extent of locating and interviewing the detainees at the Wilkens precinct on the morning of the Buffington

suicide. During the renewed investigation, seven detainees were interviewed, and four gave taped statements that, contrary to police testimony at the first trial, Buffington was not docile and calm while being held, but was instead screaming and openly threatening suicide. County Attorneys Austin and Beach received transcribed copies of these statements before the second trial, but did not supplement their earlier response to the document request with these statements.

At the second trial, several police officers again testified that James was docile while in custody at the station. This testimony supported the defendants' argument at trial that the individual defendant officers could not have known that Buffington was about to commit suicide. During trial, plaintiffs' counsel learned of the possible existence of the detainees' contradictory statements and pointedly asked Austin about them. Austin stated only that he would "look into the matter." On the day after the jury returned its verdict, plaintiffs' counsel demanded that Austin and Beach produce any detainees' statements they might have in their possession. The next day, after further demand, Austin and Beach finally produced the seven witness statements obtained in the internal investigation.

On February 9, the Buffingtons filed a motion for sanctions against Austin and Beach. The Buffingtons asserted that the refusal to produce the witness statements was a violation of the court's February 17, 1988, discovery order and that the statements would have had a significant impact on the jury's consideration of possible punitive damages, none of which were awarded. Acknowledging that "[t]he normal remedy for a party aggrieved by opposing counsel's concealment of material evidence is to move for a new trial," J.A. at 458, the Buffingtons nonetheless declined to seek a new trial to prove punitive damages. Instead, they urged the court to impose sanctions

on Austin and Beach pursuant to a finding of criminal contempt or, in the alternative, civil contempt because "failure to impose an appropriate fine would only encourage Baltimore County and its counsel to flout court orders and hide evidence in future litigation." *Id.*

The district court considered the suggestion of criminal contempt to have merit and, following the procedure outlined in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 801, 107 S.Ct. 2124, 2134, 95 L.Ed.2d 740 (1987), initially referred the matter to the United States Attorney for the District of Maryland. After the U.S. Attorney declined to prosecute, the court, citing *Young*, appointed a private prosecutor on March 9. The court later granted the private prosecutor's motions, made under seal, for an order to take depositions, Fed.R. Crim.P. 17(f), and for early production of documents, Fed.R.Crim.P. 17(c), and denied Austin's and Beach's motions to quash subpoenas. On May 23, the private prosecutor filed under seal an application for an order under Fed.R.Crim.P. 42(b) requiring Austin and Beach to appear and show cause why they should not be held in criminal contempt. The proposed order specified the conduct alleged to constitute criminal contempt under the federal criminal contempt statute, 18 U.S.C. § 401. The district court held a hearing on the application for the show cause order on June 9. On June 26, the court denied the application, bringing to a halt the criminal contempt proceedings.

On the same day, however, the court issued an order granting the Buffingtons' motion for sanctions pursuant to a finding, "[b]y clear and convincing evidence," J.A. at 1009, of civil contempt. The court held Austin and Beach in contempt for violating the February 17, 1988, discovery order by failing to supplement their response to the documents request with the later-discovered witness statements. The court reasoned that Fed.R.Civ.P.

26(e)(2)(B)[14] imposed on Austin and Beach an obligation under the circumstances to supplement their earlier response. Drawing a "weighty inference of knowing concealment from the sheer importance of these witness statements to the issues at trial," J.A. at 1001, the court found the failure to supplement to constitute a violation of Rule 26(e)(2)(B) and the court's February 17 order. Citing its authority under Fed.R.Civ.P. 37(b)(2)(D) to issue a contempt order for failure to obey a court order and its inherent authority to control discovery, the court held Austin and Beach in civil contempt.[15] The sanction

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[14] Fed.R.Civ.P. 26(e)(2)(B) provides, in pertinent part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except . . . [that a] party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

[15] The court's attempt to invoke Rule 37(b)(2) as a source of its authority to sanction this conduct was inappropriate, but its alternative reliance on the court's inherent power to control discovery was proper. Rule 37(b) sanctions apply only to violations of a court order to permit or provide discovery, or one in regard to a discovery conference. They do not apply to a violation of the duty, arising in limited circumstances under Rule 26(e), to supplement a discovery response. *See, e.g., Outley v. City of New York*, 837 F.2d 587, 589 (2d Cir.1988). The February 17 order in this case did not impose a duty to supplement the earlier response to the documents request, though the order could have so provided. *See* Fed.R.Civ.P. 26(e)(3); *United States v. IBM Corp.*, 83 F.R.D. 92, 96 (S.D.N.Y. 1979). Rather, the duty to supplement arose, if at all, under Rule 26(e)(2)(B). Because Rule 37 sanctions are not available to sanction violations of Rule 26(e), courts and commentators have recognized that reliance on the inherent power of the court to sanction violations of this discovery rule is fitting. *See Outley*, 837 F.2d at 589; *Bradley v. United States*, 866 F.2d 120, 124 n. 6 (5th Cir.1989) (power to sanction for violation of Rule 26(e) either implicit in rule or derived from court's inherent power); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th

imposed on each attorney was a fine of $6,785.37, payable to the clerk of the court, representing one-fourth of the costs incurred in the private prosecutor's truncated investigation.[16] The court characterized this sanction as "strictly compensatory." J.A. at 1009.

B

The appellants contend that the district court's ruling was in substance a finding of criminal contempt and that the sanctions are invalid because they were imposed without the procedural protections required for a criminal contempt finding. We agree, and accordingly vacate and remand the order imposing sanctions.

The first issue in reviewing a contempt sanction is whether the contempt sanction is properly characterized as civil or criminal, as this determination may bear on the type of notice required, the applicable standard of proof, and other issues. *Smith v. Sullivan*, 611 F.2d 1050, 1052 (5th Cir.1980). A district court's description of a contempt sanction as either civil or criminal is not determinative and must be scrutinized independently by the appellate court. *See Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Although the distinctions between civil and criminal contempt often become blurred when applied to par-

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Cir.1980) ("Few would question a court's inherent power to discipline breaches of Rule 26(e), even in the absence of a court order"); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2050, at 325-26 (1970) ("In the absence of a rule speaking to the question [of sanctions for Rule 26(e) violations], reliance must be on the inherent power of the court.").

[16] The Administrative Office of the United States Courts has adopted a policy of reimbursing attorneys appointed as private prosecutors in contempt actions. *See Young*, 481 U.S. at 806 n. 17, 107 S.Ct. at 2137 n. 17. The district court was aware of this policy and noted that half of the prosecutor's fees in this case would come from that source.

ticular cases, they are clear enough in the abstract: When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal. *See United States v. United Mine Workers*, 330 U.S. 258, 302-04, 67 St.Ct. 677, 700-02, 91 L.Ed. 884 (1947); 3 C. Wright, *Federal Practice & Procedure: Criminal 2d* § 704, at 823-24 (1982). In treating a particular contempt sanction as civil or criminal, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks v. Feiock*, 485 U.S. 624, 631, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988). In *Hicks*, the Supreme Court clarified "a few straightforward rules" for ascertaining "the character of the relief":

> If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

Id. at 631-32, 108 S.Ct. at 1429-30 (citations omitted).

The contempt sanction in this case was punitive—a fine payable to the court, not conditioned on compliance with a court order. (As the court noted, compliance with the discovery order, or, more precisely, the duty to supplement arising under Rule 26(e), had now become impossible.) There is no doubt that the district court can impose a fixed, monetary, civil contempt sanction to compensate for losses sustained by violation of a discovery order or of Rule 26(e). Fed.R.Civ.P. 37(b)(2) (discovery order violation); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (same); *Perkinson v. Gilbert-Robertson, Inc.*, 821 F.2d 686 (D.C. Cir. 1987) (Rule 26(e) violation). In such cases, however, the sanctions are payable to the complaining adverse party, and the amount is determined by losses flowing from expenses incurred as a result of the violation. The relief in this case, however, was not tailored to compensate the complaining party—the Buffingtons—for any losses incurred by them as a result of the defendants' failure to comply with their duty to supplement their earlier response to the court order. Rather, it compensated for half of the expenses incurred in the court's effort to "vindicate its authority" by setting in motion the private prosecutor's investigation and was payable directly to the court. *See Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 779 (9th Cir.1983) (judgment of contempt was criminal where fine paid to court had purpose of punishing plaintiff for completed acts of disobedience in failing to return confidential documents). The fact that this punitive fine had the incidental effect of compensating for the costs of prosecuting the violation is neither surprising nor determinative of its character. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911) ("It is true that either form of [sanction] has also an incidental effect" that can be viewed as promoting the purpose of the alternative form of sanction).

We derive our conclusion that requiring contemnors to fund their own halted criminal contempt prosecution constitutes a punitive, criminal sanction, imposed as an incident of the court's effort to vindicate its authority, from the nature of the relief itself. *See Hicks*, 485 U.S. at 636, 108 S.Ct. at 1432. Moreover, the substance of the proceedings and the court's express statement of its reason for imposing sanctions corroborate this conclusion. *See id.* at 635, 108 S.Ct. at 1431 ("the purposes that lie behind the particular kinds of relief are germane to understanding their character."). It is undisputed that the contempt proceedings were initiated to vindicate the authority of the court and to punish the actions of the alleged contemnors. *See, e.g.*, J.A. at 797 (letter of district court seeking appointment of U.S. Attorney stating that "[w]hile reviewing the matter, the prosecutor's duty is clear. He 'is appointed solely to pursue the public interest in vindication of the court's authority' " (quoting *Young*, 481 U.S. at 804, 107 S.Ct. at 2135)). Nor is there any dispute that the "substance of the proceeding[s]," *Hicks*, 485 U.S. at 631, 108 S.Ct. at 1429, as they progressed through the early stages of investigation, was criminal—the private prosecutor had obtained discovery authorization under rules of criminal procedure and had reached the stage of applying to the court for a show cause order, pursuant to Fed.R.Crim.P. 42(b). That application was denied on the same day that the court issued its order holding Austin and Beach in contempt.[17] Furthermore the district court's statements of its reasons for imposing the sanctions discloses a predominately punitive intent, consistent with the nature of the relief actually imposed—an unconditional

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[17] Because the proceedings were criminal in nature until the court's denial of the application for the show cause order and concurrent imposition of "civil" sanctions, there is no merit to the Buffingtons' contention that the appellants failed to preserve their objection to the lack of criminal contempt procedural protections. The denial of those protections first occurred when the sanction was imposed, at which point this appeal was noted.

fine payable to the court: "In this case, as well as in future cases where counsel do not comply with an order requiring production of documents, counsel can ultimately produce one of two things: the documents or a negotiable instrument payable to the Clerk of the Court." J.A. at 1008. We hold, therefore, that the district court imposed a criminal contempt sanction in this case.

C

The Buffingtons argue that if we hold, as we have, that these contempt sanctions were criminal, we could nonetheless affirm them because the district court substantially complied with the procedural protections necessary for a judgment of criminal contempt. We disagree. Regardless of whether Austin and Beach had sufficient notice of the charges and the institution of a criminal contempt proceeding, there is no indication in this record that they ever had or waived a hearing on the charges. *See In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (party charged with contempt has constitutional right to be heard by way of defense or explanation); *Yates v. United States*, 316 F.2d 718, 725 (10th Cir. 1963) (right to hearing may be waived). The June 9 hearing on the private prosecutor's application for a show cause order does not satisfy this requirement.[18] Most fundamentally, however, the criminal contempt finding here is flawed because it was based only on "clear and convincing evidence." J.A. at 1009. A finding of criminal contempt must be based on proof beyond a reasonable doubt. *Hicks*, 485 U.S. at 632, 108 S.Ct. at 1430.

D

Although we agree with the appellants that the contempt sanctions imposed in this case were criminal in nature and must be vacated because they were not imposed under proper procedures, we reject the appellants'

[18] The contents of this closed hearing have never been transcribed.

alternative argument that the district court erred in imposing any sanction because no obligation to produce the witness statements existed. As we understand their argument, the appellants' first contention is that the February 17 order did not obligate them to produce the later-created witness statements. But, as noted, *see supra* n. 15, sanctions for a violation of Rule 26(e) may be imposed under the court's inherent power even though no order compelling the discovery was violated. Appellants' next point—that they did not breach any duty created by Rule 26(e)—deserves little attention. There was no clear error in the district court's subsidiary factfindings that Austin and Beach had possession of the detainees' witness statements before the second trial and that the refusal to apprise the Buffingtons of those critical statements permitted drawing the "weighty inference of knowing concealment." [19] Accordingly, the district court did not abuse its discretion to the extent that it found a sanctionable violation of Rule 26(e)(2)(B).

Any monetary sanction the court might impose on remand without reinstituting criminal proceedings must be civil in character: it must be designed to compensate the complaining party—the Buffingtons—for losses they incurred as a result of the violation of the discovery duty. Of course, any compensatory sanction payable to the Buffingtons must not overlap with the district court's award of attorneys' fees and expenses, a matter that must also be addressed on remand. Any reinstituted criminal contempt proceedings must of course comply with the requisites of the Federal Rules of Criminal Procedure and

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[19] The appellants' highly debatable assertion that the Buffingtons could have found and interviewed these detainee-witnesses themselves is irrelevant to whether they breached their duty under the discovery rules. The further contention that these witness statements obtained in an internal police investigation were protected work product is equally meritless. *See, e.g., Mercy v. County of Suffolk*, 93 F.R.D. 520, 522 (E.D.N.Y.1982) (work product doctrine does not apply to statements made in internal police investigation).

the constitutional protections afforded defendants in such proceedings. *See Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); 3 C. Wright, *supra*, §§ 709-14.[20]

X

For the foregoing reasons, we affirm the judgments against Officers Tucker and Gaigalas, reverse the judgments against Chief Behan and Baltimore County on both the § 1983 and state law claims, vacate and remand the award of the Buffingtons' attorneys' fees, and vacate and remand the contempt sanctions against County Attorneys Austin and Beach.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

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[20] A renewed prosecution of Austin and Beach would not raise double jeopardy concerns. Jeopardy did not attach in the prior proceedings because neither a jury was impanelled, the point at which jeopardy attaches in a jury trial, nor evidence heard, the point at which jeopardy attaches in a bench trial. *See Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed October 15, 1990

No. 88-1161

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,
Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,
Defendants-Appellants

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,
Defendants

No. 89-1021

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,

Defendants-Appellants

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants

No. 89-1040

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,

Defendants-Appellants

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants

No. 89-1054

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DONALD GAIGALAS, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity,

Defendants-Appellants

and

DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants

No. 89-1055

IN RE: JOHN A. AUSTIN; JAMES G. BEACH, III,

Appellants

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of James E. Buffington, deceased; DAVID M. BUFFINGTON, Individually,

Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and politic; CORNELIUS J. BEHAN, Individually and in his official capacity as Chief of Police; DANIEL YUSKA, Individually and in his official capacity; JOSEPH GRIBBIN, Individually and in his official capacity; L. S. HARVEY, Individually and in his official capacity; DONALD GAIGALAS, Individually and in his official capacity; KENNETH W. KRAMER, Individually and in his official capacity; RONALD L. TUCKER, Individually and in his official capacity; WILLIAM L. MAESER, Individually and in his official capacity,

Defendants

ORDER

Appellees Barbara and David Buffington and appellants Donald Gaigalas and Ronald L. Tucker's petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell and Widener voted to rehear the case in banc; and Chief Judge Ervin and Judges Hall, Phillips, Murnaghan, Sprouse, Chapman, Wilkinson, Wilkins and Niemeyer voted against rehearing the case in banc. As a majority of the Judges voted to deny rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ADJUDGED AND ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Wilkinson and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
JOSEPH C. HOWARD
United States District Judge

February 27, 1989

William F. Gately, Esq.
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250 West Pratt Street
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John A. Austin, Esq.
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Re: Buffington v. Baltimore County
Civil No. JH-87-3284

Dear Counsel:

Pending before the Court is defendants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict (Paper No. 84). Plaintiffs lodged an opposition (Paper No. 88) and the matter is ripe for disposition. No hearing is necessary. Local Rule 6(E).

Upon consideration of the papers, the Court denies defendants' motion. This "letter order" *constitutes the order from which defendants can take an appeal.* Accordingly, pursuant to Fed. R. App. Proc. 4(a)(4), defendants have thirty (30) days from the date this order is entered on the docket, which should be accomplished by tomorrow, Tuesday, February 28, to file their notice of appeal.

While the appeal is being effected, including the preparation of the trial transcripts, the Court will rule on the Motion for Attorneys' Fees and the Motion for Sanctions. By proceeding in this manner, the Fourth Circuit will have all issues before it in one appeal. In addition, the Court expects to rule on the attorneys' fees and sanctions —and explain the reasons for denying the instant motion —by March 31, 1989. Failure to do so would only be caused by my duty to sit on the Fourth Circuit occasionally while Chief Judge Winter's position is being filled, however, I would continue to give priority to all pending motions. In any event, the Court retains jurisdiction over the fees and sanctions while the appeal proceeds. *See, e.g., Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987).

Notwithstanding the informal nature of this ruling, it constitutes an Order of the Court.

Very truly yours,

/s/ Joseph C. Howard
JOSEPH C. HOWARD

JCH:dp
Original: Court file
Copies: Counsel

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants

MEMORANDUM OPINION

After two trials, plaintiffs secured a verdict against four of nine defendants. The four defendants are Officers Gaigalas and Tucker, Chief of Police Behan, and Baltimore County. Plaintiffs prevailed against them on both their § 1983 claims and their state law claims. Officers Gaigalas and Tucker were liable because they were found to be deliberately indifferent to the serious medical needs of decedent James Buffington. Chief Behan and the County were liable because of their custom and policy of being deliberately indifferent to pretrial detainees in terms of training, supervising and educating their jailors.

The defendants named above have moved for a Judgment Notwithstanding the Verdict (JNOV) (Paper #84). Plaintiffs lodged an opposition (Paper #88). The Court has already denied the motion in an order (Paper #92), and this memorandum is meant to accompany that entry.

I. RULE 50(b)

The standard the Court employs in analyzing a motion for judgment notwithstanding the verdict is whether there is "evidence upon which the jury could *reasonably* return a verdict for him." *Cobb v. Nizami*, 851 F.2d 730, 733 (4th Cir. 1988) (citing *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106 (4th Cir. 1974) (emphasis in original); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160 (4th Cir. 1988) (quoting *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980). *See generally*, 9 Wright and Miller, *Federal Practice and Procedure* § 2537 at 599 n.38 and § 2524 text at n.31 (1971).

The Court is bound by other rules. One is that it may not judge the credibility of witnesses, 9 Wright and Miller, *Federal Practice and Procedure* § 2524 at 543-44 (1971), and another is that the Court must view the evidence adduced at trial in a light most favorable to the party winning the verdict, or stated otherwise, the non-moving party. *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 199 (4th Cir. 1988); *Crinkley, supra*.

II. WAIVER OF THE SOVEREIGN IMMUNITY ISSUE

First, defendant Baltimore County argues that the state claims—wrongful death and survival which both sound in negligence—should be struck because the County has not waived its governmental immunity. The Court admires the County's persistence here but the Court of Appeals of Maryland has held that "a legislative mandate to carry liability insurance is a strong indication of legislative intent that sovereign immunity is waived to the extent of the insurance." *Jackson v. Housing Opportunities Comm.*, 289 Md. 118, 129 (1980). The *Jackson* court then quoted the Supreme Court of Montana which said, "this Court fails to see how it can be argued that the Legislature would require insurance to

be carried and then deny any means of recovery to an individual injured. . . ." *Id.* Here, the Baltimore County Code expressly established an insurance fund "which the county . . . may be legally obligated to pay for liability claims." Baltimore County Code § 2-131(b). In this Court's view, that requirement constitutes a limited waiver of sovereign immunity. This result is consistent with recent Maryland cases. *See, e.g., Kee v. State Highway Administration*, 313 Md. 445, 455 (1988) ("A waiver of sovereign or governmental immunity from suit generally requires that two conditions be met. First, the Legislature must authorize suits for damages, and second, there must be a provision for the payment of judgments."); *MD—Nat'l Capitol Parks & Planning Comm. v. Kranz*, 308 Md. 618 (1987). *Cf. Clea v. City of Baltimore*, 312 Md. 662 (1988) (discussing immunity for City of Baltimore which is uniquely a state agency).

III. DEFENDANTS' CLAIM OF QUALIFIED IMMUNITY FOR STATE LAW CLAIMS

Second, defendants Behan, Tucker and Gaigalas claim qualified immunity which is available to police officers. *E.g., Clea, supra.* Under Maryland law, availability of this doctrine turns on whether the tortious conduct was discretionary or ministerial. Discretionary acts deserve immunity; ministerial do not. *Clea*, 312 Md. at 672-73. Executing a search warant is a discretionary act, *id.* at 673, as is a decision to apprehend a citizen, *Ashburn v. Anne Arundel County*, 306 Md. 617 (1986), but driving an ambulance is not, *James v. P.G. County*, 288 Md. 315 (1980), and of utmost importance here, the care of prisoners is not. Restatement (Second) of Torts § 895D. The Court relies not only on the Restatement but also the trial testimony. Every defendant police officer testified that the Wilkens Avenue precinct had a standing order that disturbed or suicidal persons awaiting an emergency psychiatric evaluation—like Buffington—were to remain chained to a bar attached to the front desk of

the precinct. Placing them in an isolation cell was not a viable alternative or, to quote Officer Gaigalas, would be "almost criminal." Helpful to the Court would be some authority that the discretionary/ministerial distinction is a question of law or a question of fact or a mixed question of law and fact. At the very least, it appears to be a mixed question of law and fact and perhaps is more simply a question of law. But under either calculus, the evidence at trial revealed that defendants under the circumstances presented had no "freedom to act according to . . . [their] judgment." *Askum v. Anne Arundel County*, 306 Md. 617, 623 (1986). Here, there was no "absence of a hard and fast rule," *id.*, but rather a fiat that all defendants acknowledged. Thus, these men have no qualified immunity.

Recent Supreme Court and Fourth Circuit authority are consistent with Maryland jurisprudence. *See Berkovitz v. U.S.*, 108 S. Ct. 1954 (1988); *Patterson v. U.S.*, 856 F.2d 670 (4th Cir. 1988). Both of these cases addressed claims under the Federal Tort Claims Act.[1] The issues presented included whether alleged negligent conduct was the product of discretionary or ministerial acts. The Supreme Court said:

> [A] court must first consider whether the action is a matter of choice for the acting employee .... Conduct cannot be discretionary unless it involves an element of judgment or choice. Thus, the *discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow.*

56 U.S.L.W. 4549, 4550 (1988) (all citations omitted) (emphasis supplied).

---

[1] The Court acknowledges the FTCA has no application here, yet it believes this authority need not be ignored when the underlying issue is almost identical to the one raised here under state law.

As stated earlier, because all officers at the Wilkens police precinct were aware of the standing order to keep a suicidal subject at the rail, there was no discretion to exercise.

IV. SECTION 1983 AND THE COUNTY

Third, Baltimore County seeks to overturn judgment on the federal, or § 1983, claims. Among other things, it argues that, because *Spell I* was issued after the Buffington suicide, any reference to that opinion is not proper. This type of argument, if made sincerely, defies description. Suffice it to say, *Spell* merely clarified law in existence since at least the *Monell* decision over a decade ago, *see Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and arguably since § 1983's enactment which dates back to 1871. *See Monell*, 436 U.S. at 664-701.

More to the point, the County argues that no unconstitutional custom or policy existed with which liability could attach under *Spell I*, 824 F.2d 1380 (4th Cir. 1987). To the extent that the County argues sufficiency of the evidence, the Court rejects the argument and defers to the jury's verdict which rested on sufficient evidence. To the extent the County argues that Behan and the County never actually established a policy of deliberate indifference, the Court relies on the recent, excellent and relevant case of *Cabrales v. County of Los Angeles*, 864 F.2d 1454 (9th Cir. 1988). The *Cabrales* panel stated:

> The appellants seem to argue that only *affirmative* acts constitute a policy or custom for Section 1983 purposes, and no policy-maker 'affirmatively' adopted a policy of deliberate indifference. Such is not the case. The very notion of deliberate 'indifference' connotes a regime where neglect of detainees' medical and psychological needs proves a constitutional violation. Also, the acts of omission, as well as commis-

sion, may constitute the predicate for a finding of liability under Section 1983.

Id. at 1461. Between these two parameters, the Court thinks it has captured defendants' arguments and theories and finds them without merit.

V. SECTION 1983 AND THE INDIVIDUAL DEFENDANTS

A. *Inconsistent Verdicts*

Fourth, defendants Behan, Tucker and Gaigalas argue that the verdicts were inconsistent as to them (JNOV at 16). This is waived. A party aggrieved by an alleged inconsistent verdict must move to have the issues resubmitted to the jury before the jurors are permanently dismissed. 5A *Moore's Federal Practice* at 49-45 n.16 (2d ed. 1988). This was not requested.

B. *Sufficiency of the Evidence*

These individual defendants also argue sufficiency of the evidence. The evidence established that they were deliberately indifferent. The jury heard it all, the Court heard it all—not once but twice—and the Fourth Circuit can read the transcripts. Other than that, the Court declines to painstakingly review the evidence. It is all in the record.

C. *Damages from Pain and Suffering by Decedent*

The only other argument worth addressing is defendants' belief that the decedent died by hanging and, therefore, incurred no pain and suffering. Thus, according to defendants, his $10,000 compensatory damage award should be stricken. There was evidence adduced at trial, which is not really needed to address this issue, *see* Fed. R. Evid. 201, that death by hanging is not the functional equivalent of a walk on the beach. There is no merit in this argument.

D. *Qualified Immunity Under Federal Law*

Finally, the Court will address individual defendants' claim that they are entitled to qualified immunity, not under state law, but rather under § 1983. *See* Defendants' Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict at 3, para. 7 (filed Jan. 27, 1989). Before the 1989 trial, the Court ruled this federal qualified immunity was unavailable to all the officers. Because that ruling was immediately appealable, *Turner v. Dammon*, 848 F.2d 440, 443 (4th Cir. 1988); *Young v. Lynch*, 846 F.2d 960, 961 (4th Cir. 1988); *Sevigny v. Dicksey*, 846 F.2d 953, 955 n.2 (4th Cir. 1988), defendants appeared before Chief Judge Winter in his chambers, where he affirmed this Court's decision.

Over the past year, the Fourth Circuit has held repeatedly that governmental officials performing discretionary [2] functions are not liable when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Bright v. McClure*, 865 F.2d 623, 625 (4th Cir. 1989); *Clark v. Brown*, 861 F.2d 66, 67 (4th Cir. 1988); *Osabutey v. Welch*, 857 F.2d 220, 223 (4th Cir. 1988); *Turner v. Dammon*, 848 F.2d 440, 443 (4th Cir. 1988); *Young v. Lynch*, 846 F.2d 960, 963 (4th Cir. 1988); *Sevigny v. Dicksey*, 846 F.2d 953, 956 (4th Cir. 1988). The Court believes defendants have never, ever made the required showing.

To prevail on qualified immunity, defendants must establish what they knew and when they knew it. *See, e.g., Anderson v. Creighton*, 55 U.S.L.W. 5092, 5095 n.2 (S. Ct., June 25, 1987) (Stevens, J., dissenting). Moreover, defendants have not offered any proof that they reasonably did not know the current applicable law. Oftentimes, a qualified immunity issue is quite literally resolved by

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[2] For purposes of this discussion, the Court will assume the acts at issue here were discretionary ones.

looking to the time state actors allegedly ran afoul of the law and then looking to when that law became clearly established. Dates, years and when the law fully crystalized become highly relevant factors. *Germany v. Vance*, 868 F.2d 9, 16 (1st Cir. 1989) ("In 1980, the contours of the right of access to the court were sufficiently clear so that a reasonable official would understand that the right would be violated by the intentional or recklessly indifferent withholding of potentially exculpatory information from an adjudicated delinquent or from the court itself."). *See, e.g., Melear v. Spears*, 862 F.2d 1177, 1184 (5th Cir. 1989) ("[A]ppellant would have us hold that two cases existing in May, 1984 demonstrate that the law was not clearly established at the time. . . ."); *Ryan v. Burlington County*, 860 F.2d 1199, 1206 (3d Cir. 1988) ("[Defendants] do not argue that Ryan's constitutional right to personal security was not clearly established in [the year] 1983, nor do they disagree with the district court's conclusions that the right to personal security includes the right of a pretrial detainee to be housed separately from convicted inmates who are known to be dangerous. . . ."); *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (" 'clearly established' means that the contours of the right *were so clear at the time* the officials acted that a reasonable official would have understood that what he was doing violated that right"); *Rakovich v. Wade*, 850 F.2d 1180, 1207 (7th Cir. 1988) ("Clearly, the 1984-1985 trial occurred at a time when the objective test of qualified immunity . . . was firmly established by the 1982 *Harlow* decision."); *id.* at 1209 (citing and quoting *Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984) (the test "focuses on the state of the law at the time of the alleged violation")). *See also Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988); *Abel v. Miller*, 824 F.2d 1522 (7th Cir. 1987); *Torantion v. Baker*, 825 F.2d 772 (4th Cir. 1987).

Defendants have never misunderstood the wrongfulness of the allegations made against them. They knew it was

wrong to place a suicidal person in an isolation cell; but, their defense at trial was that they simply did not know Buffington was suicidal. They have never, for example, argued that a pretrial detainee's Fourteenth Amendment due process right was judicially created only recently. *Cf. Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988) ("Gebbie argues that the law was not clearly established as to the procedures due in Brady's case. Specific binding precedent is not required to show that a right is clearly established for qualified immunity purposes."); *Matherne v. Wilson*, 851 F.2d 752, 757 (5th Cir. 1988) ("The inquiry is whether in July, 1983, the law was sufficiently clear . . . . We are not persuaded that it was."). They have never argued that even if they knew the law was in existence their actions were objectively reasonable. *Osobutey v. Welch*, 857 F.2d 220, 223 n.5 (4th Cir. 1988).

Above, the Court attempted to demonstrate that defendants did not properly raise the matter of qualified immunity, or, if it was properly raised, it was not adequately proven with affidavits from the individual officers. But, if it is necessary to get to the merits, this Court has no hesitation in finding a clearly established constitutional right of the decedent of which a reasonable police officer would have known.

In *Boswell v. Sherbourne County*, 849 F.2d 1117 (8th Cir. 1988), the court determined that "we are confident that a pretrial detainee's right to emergency medical care was both clearly established and clearly contoured before March 1984, when the incident Boswell complains of took place." *Id.* at 1121. While declining to proffer a conspectus of cases, the *Boswell* court proceeded to identify a 1980 Tenth Circuit case, a 1981 Eighth Circuit case, and finally, the basis for it all which was *Estelle v. Gamble*, 429 U.S. 97 (1976), a Supreme Court case decided eleven years before the incident in this case. In addition to *Boswell*, the Court relies on *Cortes-Ouinones v. Jimenez-Nettleship*, 842 F.2d 556, 561 (1st Cir. 1988) and *Mir-*

anda v. Munoz, 770 F.2d 255 (1st Cir. 1985) (although that court erroneously analyzed pretrial detainee's claim under the Eighth Amendment, nevertheless the standard is the same under the Fourteenth, *see Cabrales v. County of L.A.*, 864 F.2d 1454, 1461 n.2 (9th Cir. 1988)).

The paragraph above is helpful but not essential to the Court's denial of qualified immunity here. In that regard, the First Circuit has explained:

> In order to sustain a finding that a 'clearly established' right was violated, it is not necessary for plaintiff to cite cases in which the specific sort of conduct complained of was found to be unlawful. 'It is enough, rather, that there existed case law sufficient to clearly establish that, if a court *were* presented with such a situation, the court would find that plaintiff's rights were violated.'

Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987); *Germany v. Vance*, 868 F.2d 9, 16 (1st Cir. 1989).

Given the facts of this case, little or no case law is necessary to demonstrate that the conduct complained of here was unlawful. Nor was it necessary for the police officers at Wilkens Police Station to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated jail cell with his pants on. A semi-clear head and a normal degree of common sense would have sufficed. Defendants' claim of qualified immunity must fail.

/s/ Joseph C. Howard
JOSEPH C. HOWARD
United States District Judge

Date: May 22, 1989

APPENDIX E

VERDICT SHEET

1. As to the plaintiffs' constitutional claims, do you find in favor of the plaintiffs? Indicate your finding in favor of the plaintiffs by placing a check-mark in the space provided for "yes" responses. If your finding is in favor of a particular defendant, indicate this by placing a check-mark in the space provided for "no" responses. This question must be answered "yes" or "no" as to each defendant listed below:

a. Officer Harvey	Yes	✓ No
b. Corporal Gribbin	Yes	✓ No
c. Sergeant Yuska	Yes	✓ No
d. Officer Maeser	Yes	✓ No
e. Officer Tucker	✓ Yes	No
f. Officer Gaigalas	✓ Yes	No
g. Captain Kramer	Yes	✓ No
h. Chief Behan	✓ Yes	No
i. Baltimore County	✓ Yes	No

If your answer with regard to *any* of the defendants above is "yes," please go to the next question. If your answer with regard to *all* of the defendants is 'no," please go directly to question number 4.

2. As to the plaintiffs' constitutional claims, what amount of compensatory damages do you award? This question must be answered separately as to each plaintiff listed below:

    a. Compensatory damages awarded to the estate of James E. Buffington, deceased:

        1. For conscious pain and suffering: $10,000.00;

2. For loss of life: $100,000.00.

b. Compensatory damages awarded to Barbara Buffington. $50,000.00.

c. Compensatory damages awarded to David M. Buffington. $25,000.00.

After completion of question number 2 a-c, please go to the next question.

3. As to the plaintiffs' constitutional claims, what amounts of punitive damages, if any, do you award the plaintiffs? This question must be answered separately as to each defendant against whom you have previously assessed compensatory damages.

a. Punitive damages award against Chief Behan: $_____.

b. Punitive damages award against Captain Kramer: $_____.

c. Punitive damages award against Sergeant Yuska: $_____.

d. Punitive damages award against Corporal Gribbin: $_____.

e. Punitive damages award against Officer Harvey: $_____.

f. Punitive damages award against Officer Maeser: $_____.

g. Punitive damages award against Officer Tucker: $_____.

h. Punitive damages award against Officer Gaigalas: $_____.

After completion of question number 3 a-h, please go to the next question.

4. As to the plaintiffs' claims of negligence under Maryland law, do you find in favor of the plaintiffs? Indi-

cate your finding in favor of the plaintiffs by placing a check-mark in the space provided for "yes" responses. If your finding is in favor of a particular defendant, indicate this by placing a check-mark in the space provided for "no" responses. This question must be answered "yes" or "no" as to each defendant listed below:

a. Offiver Harvey	Yes	✓ No
b. Corporal Gribbin	Yes	✓ No
c. Sergeant Yuska	Yes	✓ No
d. Officer Maeser	Yes	✓ No
e. Officer Tucker	✓ Yes	No
f. Officer Gaigalas	✓ Yes	No
g. Captain Kramer	Yes	✓ No
h. Chief Behan	✓ Yes	No
i. Baltimore County	✓ Yes	No

If your answer with regard to any of the defendants above is "yes," there is no need to consider damages (since this has already been answered in question 2). If you have already awarded damages in question number 2, and have answered questions 1 through 4, please go to the last page and sign the verdict sheet.

However, if and only if you found in favor of all the defendants on the constitutional claims in question 1 (by checking every "no" response), please go to question number 5.

5. As to the plaintiffs' negligence claims, what amount of compensatory damages do you award?

   a. Compensatory damages award to the estate of James E. Buffington, deceased. $————.

   b. Compensatory damages awarded to Barbara Buffington. $————.

c. Compensatory damages awarded to David M. Buffington. $————.

After completion of question number 5, please go to the last question.

6. With respect to each defendant, if any, against whom you awarded compensatory damages in response to question no. 5, what amount of punitive damages, if any, do you award in favor of the plaintiffs? This question must be answered separately as to each defendant.

a. Punitive damages against Chief Behan. $————.

b. Punitive damages against Captain Kramer. $————.

c. Punitive damages against Sergeant Yuska. $————.

d. Punitive damages against Corporal Gribbin. $————.

e. Punitive damages against Officer Harvey. $————.

f. Punitive damages against Officer Maeser. $————.

g. Punitive damages against Officer Tucker. $————.

h. Punitive damages against Officer Gaigalas. $————.

Foreman January —, 1989.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1161 (L), 89-1021,
89-1040, 89-1054

BARBARA BUFFINGTON, *et al.*,
Appellees,
v.
BALTIMORE COUNTY, MARYLAND, *et al.*,
Appellants.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE
UNITED STATES DISTRICT COURT
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November 27, 1989

* * * *

A. All Individual Appellants Were Entitled To A Qualified Immunity As A Matter Of Law.

In our opening brief, we argued that the individual Appellants' qualified immunity required that the judgment against them be dismissed. Brief at 16. In their response, Appellees' exclusive counterargument is that there is no basis for asserting the qualified immunity defense because a *constitutional* right is at issue in this case.[7] Appellees' analysis of the doctrine of qualified immunity clearly is incorrect.

Contrary to Appellees' argument, the doctrine of qualified immunity protects public officials even when there is a finding that constitutional rights have been violated; otherwise, the immunity would be meaningless. *See, e.g., Anderson* v. *Creighton*, 483 U.S. 635 (1987) (qualified immunity shielded FBI agent from liability in situation involving unconstitutional search and seizure); *Danese*, 875 F.2d at 1242 (qualified immunity shielded police officers from liability in claim involving failure to provide protection for detainee who committed suicide). In *Anderson*, the Supreme Court stated that government officials are entitled to qualified immunity "as long as their actions could *reasonably have been thought consistent* with the rights they are alleged to have violated." 483 U.S. at 638 (emphasis added).[8] The Court further stated that

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[7] Appellees base this argument on a misreading of our opening brief. In our opening brief we stated: "Absent a constitutionally secured right . . . the State officer may assert and prevail upon the doctrine of qualified immunity." Brief at 16-17. By the term, "constitutionally secured right," Appellants plainly meant a right securely and clearly established in the Constitution and in the case law construing the Constitution. See *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

[8] In support of this proposition, *Anderson* cites, among other cases, *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) ("qualified immunity protects 'all but the plainly incompetent or those who know-

"whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were *'clearly established'* at the time it was taken." 483 U.S. at 639. (citation omitted) (emphasis added).

In interpreting the standards articulated in *Anderson*, the Sixth Circuit held in *Danese* (a case remarkably similar to this case—see p. 7, *supra*) that in order to prevail in a Section 1983 action, "the plaintiff must show that the constitutional right alleged to have been violated was a clearly established right at the time of the challenged action." 875 F.2d at 1242.[9] Appellees cannot simply point to "a generalized right," like the right to due process. *Id., citing Anderson*, 483 U.S. at 638. Rather, the right "must be clearly established in a 'particularized' sense, so that 'the contours of the right' are clear enough for any reasonable official in the defendants' position to know that what the official is doing violates that right." *Id., citing Anderson*, 483 U.S. at 3039.

Applying these standards, the Sixth Circuit in *Danese* held that the "right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide" were not "particularized rights as required by *Anderson* and, thus, were not sufficient to deny the defendants qualified immunity." 875 F.2d at 1243-44. The court also held that

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ingly violate the law' "); and *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) ("officials are immune unless 'the law clearly proscribed the actions' they took").

[9] Similarly, in another case in which police officers were being sued for failure to protect a detainee from suicide, the Fifth Circuit held that police officers were protected by limited immunity because the right at issue—to be protected against suicide—was not clearly established under the Constitution at the time of the violation. *Gagne*, 805 F.2d at 560.

the claims against the policy-making defendants in the case had to be dismissed because:

> [i]f the officers were not subject to a clearly established constitutional duty [to protect appellee from committing suicide], their supervisors cannot be liable for not training them to meet such a duty.

Id. at 1245. The holding of *Danese* with regard to qualified immunity is directly on point and, if applied, requires dismissal of all claims against the individual Appellants.

* * * *

Supreme Court, U.S.
FILED
FEB 12 1991
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(2)

No. 90-1123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1123

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

Respondents, Barbara Buffington and David Buffington, respectfully request that the petition for issuance of a writ of certiorari be denied.

STATEMENT OF THE CASE

Barbara Buffington and David Buffington, respondents herein, adopt and incorporate by reference their "Statement of the Case" previously submitted in connection with their Petition for a Writ of Certiorari (No. 90-1071) which was filed on January 3, 1991.

SUMMARY OF ARGUMENT

Both questions presented by the officers were not raised or litigated in the district court. For the first time since the inception of this litigation, the officers' Petition contends that the Due Process Clause affords no protection

to a person in police custody who is known to be on the verge of suicide. In the district court, however, the officers at all times conceded that they had the duty to protect persons in their custody who are known to be suicidal. Instead, the officers' defense at trial, as consistently advocated by their trial counsel, was that the officers did not know that James Buffington was suicidal, and therefore they could not be found deliberately indifferent to his serious medical needs.

Even if petitioners had properly preserved the issue, it is clear that the Fourth Circuit properly held, in conformity with uniform federal decisional law, that police officers have a constitutional duty not to be deliberately indifferent to a person in their custody who is known to be suicidal and in need of emergency intervention.

The second question raised by petitioners was also not properly preserved for consideration by this Court. The qualified immunity defense was not raised in pretrial motions, and was not asserted by the officers when they unsuccessfully moved at trial for a directed verdict. The Fourth Circuit correctly found that the officers failed to preserve the issue for appellate review. Moreover, in the factual context of this case, the defense is inapplicable. The defense does not apply to this case because the officers conceded that they had the duty to safeguard a detainee who was known to be suicidal. Thus, this case does *not* present the issue of whether police officers have the duty to screen prisoners in order to detect *latent* suicidal tendencies.

REASONS FOR DENYING THE PETITION

I. THE OFFICERS' DUE PROCESS ARGUMENT SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED OR LITIGATED IN THE LOWER COURTS

Officers Gaigalas and Tucker assert that the Fourth Circuit erred in holding that police officers have a constitutional duty not to be deliberately indifferent to a de-

tainee known to be suicidal and in need of emergency psychiatric care. Petitioners take issue with the Fourth Circuit holding that the jury was properly instructed that they could find the officers liable under § 1983 "if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nevertheless acted with deliberate indifference in failing to take any steps to prevent the suicide." Petition Appendix at p. 10. The officers contend that this holding is "inconsistent with this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)." Petition at p. 10. Officers Gaigalas and Tucker assert that Buffington's suicide resulted from his own *private* conduct, and therefore they had no constitutional duty to protect him from suicide. Petition at p. 10. The officers assert that the Fourth Circuit erred in focusing on the fact of custody as opposed to the "source of the harm":

> Focusing on the fact that Buffington was in the custody of the police at the time he committed his suicide, the court of appeals failed to accord the necessary weight to the fact that Buffington's resolve to commit suicide was not created or controlled by state actors. Thus, the court ignored that portion of the *DeShaney* decision that the source of the harm is a significant factor in determining whether the State owes an affirmative constitutional duty. . . . Because it fails to accord any weight to the fact that the harm to Buffington resulted directly from his own *private* conduct, the holding of the Fourth Circuit is inconsistent with the constitutional principles set forth in *DeShaney*.

Petition at p. 10 (emphasis original). This argument will hereafter be referred to as petitioners' "*DeShaney*-private action" argument.

The officers also argue that the Fourth Circuit's holding is "squarely inconsistent" with the Sixth Circuit's decision in *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990). Petition at

p. 11. According to the officers, "[i]n *Danese*, the Sixth Circuit held that, as a matter of law, there is no due process right to be protected from suicide." Petition at p. 11.[1]

The "*DeShaney*-private action" argument has now surfaced for the first time since the inception of this litigation. However, if the officers had wished to litigate this issue, it should have been raised in the officers' pretrial motions to dismiss and at the required time during trial. The officers failed to raise this issue at the following stages of this litigation:

—It was not raised in defendants' "Motion To Dismiss Or, In The Alternative, Motion For Summary Judgment" filed 1/20/88 (App. 1a-10a).[2]

—It was not raised in defendants' "Motion To Dismiss The Amended Complaint, Or In The Alternative, Motion For Summary Judgment" filed 9/8/88 (App. 11a-19a).

—It was not raised in defendants' "Motion For A Directed Verdict And For Judgment Notwithstanding The Verdict" filed 12/2/88 (App. 20a-25a).

—It was not raised at the close of plaintiffs' case on 1/12/89 (App. 26a-28a).

—It was not raised at the close of all the evidence in the case on 1/12/89 (App. 29a-35a).

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[1] The officers raise the specter that the Fourth Circuit's holding will require government to provide suicide-proof facilities and "expensive monitoring equipment." Petition at p. 12. Actually, the plaintiffs' expert, Joseph Rowan, was the only witness at trial who spoke to the issue of the expense of jail suicide prevention. Mr. Rowan testified that "[t]raining is the most important aspect of suicide prevention," (Apx. 1582) and that such training is "very inexpensive." (Apx. 1608). References to the district court transcript included in the record below are styled "Apx. ——".

[2] References to the appendices bound with respondents' Brief in Opposition are styled "App. ——".

—It was not raised in defendants' exceptions on 1/17/89 to the district court's instructions. (App. 39a-43a).

—It was not raised in "Motion Of Defendants For A Directed Verdict And For Judgment Notwithstanding the Verdict" filed 1/27/89. (App. 44a-50a).

Moreover, although the officers' Fourth Circuit appellate brief relied upon *DeShaney*, and thereby raised a due process argument for the first time, the officers' brief raised a materially different due process argument (discussed *infra* at pp. 11-12) than the one contained in the officers' Petition.

The officers' defense at trial was not based on the claim that the Due Process Clause provided no protection to a suicidal detainee. Instead, the officers defended on the basis that a § 1983 action could not be based on mere negligence, and absent knowledge that Buffington was suicidal, the officers were at most merely negligent.

Based on their negligence defense, the officers moved for a directed verdict at the close of the evidence offered by the Buffingtons. The officers' trial counsel stated:

> The first point is with respect to the civil rights claim under Section 1983. The standard must be proof of deliberate indifference of the various individual defendants involved, including Chief Behan, and deliberate indifference is synonymous with wanton neglect, with willful misconduct in regard to the serious medical needs of persons such as Mr. Buffington.

(App. 27a). Thus at trial the officers conceded that a "deliberate indifference" standard was applicable.[3] The officers did not move for directed verdict on the basis that Buffington's suicide resulted from a *private* act

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[3] It should be noted that plaintiffs did not agree with the officers' definition of "deliberate indifference." *See* footnote 7, *infra*.

which did not implicate the protections afforded by the Due Process Clause. Instead, the officers' defense at trial was premised on the notion that the Buffingtons, in reality, had no more than a negligence suit, and that negligence was not actionable under § 1983. In moving for a directed verdict the officers stated:

> The claims against the individual Defendants are founded in negligence theories asserting claims under Section 1983. However, since the claims are merely for negligence, it is plain that these claims are not actionable. *See Daniels v. Williams*, 106 S.Ct. 666 (1986) and *Davidson v. Cannon*, 106 S.Ct. 668 (1986). Further the evidence at trial in these proceedings fail (sic) to demonstrate more than mere negligence. At best, the testimony generated proof only of errors of judgments or an inadvertent failure to take appropriate action. Such conduct does not amount to 'deliberate indifference.'

(App. 22a). In moving for directed verdict the officers further stated: "Evaluating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date. . . . A straightforward application of the requirement of deliberate indifference plainly requires a dismissal of the Federal claims against each of the Defendants." (App. 25a).

It is settled that the failure to raise a question in a motion for directed verdict waives appellate review of that issue. *E.g., Tights, Inc. v. Acme-McCary Corp.*, 541 F.2d 1047, 1058 (4th Cir. 1976).

When the officers moved for a directed verdict at the close of all of the evidence they again failed to assert that a suicidal detainee such as Buffington was not entitled to any due process protection. Instead the officers essentially renewed the arguments made at the close of plaintiffs' case. Defense counsel stated as follows:

> Again with respect to Officer Gaigalas, he testified that he knew of the emergency evaluation but not

> that the gentlemen was suicidal. There is a lack of knowledge in his circumstances, and again there are (sic) testimony at best generally not deliberate indifference but only proof of errors in judgment or inadvertence and at best negligence, and negligence has never amounted to deliberate indifference. In fact, the Supreme Court held that negligence is not actionable under Section 1983; and again the leading cases on that are Daniels versus Williams [and] Davidson versus Cannon. Again, in one of those cases a correctional officer was sued because he had not passed along a note that contained threats, and the court held that failure to pass along was inadvertence. He was negligent but was not culpable under Section 1983. . . . As to all of these officers that same standard should apply with respect to 1983.

(App. 34a). The district court reserved ruling on the officers' motion for directed verdict, and the case went to the jury.

The jury was instructed as to the nature of the constitutional duty owed by the officers to Buffington:

> Police officers have a specific constitutional duty to provide needed medical care to the persons within their custody. The constitution requires that medical care be given for psychological and psychiatric ills as well as physical ills. The Constitution is violated by deliberate indifference to a serious medical need of a detainee.
>
> * * * *
>
> As part of the constitutional duty to provide medical care, the constitution requires that police officers protect a detainee from committing suicide if they are aware that the person in their custody is suicidal and needs emergency psychiatric treatment. The failure to do so can amount to deliberate indifference in the constitutional sense.
>
> Now, on the other hand, you are instructed that those who confine a detainee cannot be placed into a position of guaranteeing that a detainee will not

> commit suicide if they have no knowledge that he is suicidal.

(App. 37a-38a).[4] These instructions were the product of three charging conferences in which the district court and counsel went over proposed instructions word-by-word. (App. 39a; 43a). As a part of this tedious and time consuming process, the district court made those changes that "reflected the discussion of everyone." (App. 43a).

After the district court instructed the jury, counsel for the officers did not argue that the officers owed no duty to Buffington for the reason that "his resolve to commit suicide was not created or controlled by state actors." *See* Petition at p. 10. Instead, counsel for the officers objected on the basis that a suicidal detainee does not have a serious medical need:

> The law is the officers have a duty to give medical care and not be deliberately indifferent to medical needs. There is no constitutional standard requiring inmates to be protected from committing suicide.

(App. 40a). "An exception on one ground cannot serve as the basis for another, on a different ground, on appeal." *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.), *cert. denied*, 109 S.Ct. 392 (1988). The officers thus failed to comply

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[4] There is "no sound underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). The "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), applies both to the constitutional adequacy of psychological or psychiatric care provided at a prison. *Inmates of Allegheny City Jail v. Pierce*, 612 F.2d 754, 763 (3rd Cir. 1979). Treatment of mental disorders of mentally disturbed inmates may constitute a "serious medical need." *E.g., Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). Additional authorities are cited in footnotes 9 and 15, *infra*.

with the requirement of Fed. R. Civ. P. 51 that an objection must be specifically stated in order to preserve the point for appellate review.

In moving for judgment notwithstanding the verdict, the officers again failed to raise the argument that the deliberate indifference standard did not apply to harm resulting from Buffington's "own private conduct." Instead, the defendants argued, as they had before, that Officers Gaigalas and Tucker were not deliberately indifferent to Buffington's serious medical needs. The memorandum in support of the Motion for Judgment Notwithstanding the Verdict stated as follows:

> Further, there is no evidence that Officer Tucker was deliberately indifferent to Mr. Buffington's serious medical needs, or that he even had actual notice of the nature and extent of Mr. Buffington's medical needs. As has been repeatedly argued throughout these proceedings, proof of deliberate indifferent (sic) requires evidence which clearly demonstrates knowledge of the medical need in question and conduct with respect to the prisoner and the known medical need that wantonly or recklessly disregarded the seriousness of the medical need. . . . As to Officer Tucker, there is no evidence that he had knowledge of the full nature and extent of Mr. Buffington's emotional deterioration sufficient to require him to intervene and overrule Officer Gaigalas' handling of the situation. In short, there is no conduct on his part that was deliberately indifferent to a known serious medical need of Mr. Buffington.

(App. 49a).

Similarly, the defense of Officer Gaigalas was singularly premised on the contention that he was at best merely negligent:

> The evidence adduced against him demonstrates mere errors in judgment on his part or an inadvertent failure to take appropriate action by maintaining Mr. Buffington at the bar. . . . [T]he jury's

> verdict against Officer Gaigalas must have plainly rested upon findings by them that he was merely negligent in his conduct with respect to the safety of Mr. James Buffington.

(App. 49a-50a).[5] The district court denied the defendants' motion.

Although the Buffingtons have agreed from the outset of this case that a § 1983 action cannot be premised on mere negligence, issue was joined at trial on the question of whether the officers' conduct constituted "deliberate indifference." This question in turn reduced ultimately to the question of whether the officers knew that Buffington was suicidal prior to placing him in an unmonitored cell. At no time during the pretrial or trial phase of this case did the officers dispute that a § 1983 right to relief existed if the Buffingtons could prove deliberate indifference.

Because the officers' "*DeShaney*-private action" argument is made for the first time in the petition for writ of certiorari, the Court should decline to consider it. *See, e.g., City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts. . . . That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction. . . ."); *Miree v. De Kalb County*, 433 U.S. 25, 34-35 (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.").

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[5] Apropos petitioners' emphasis on the expense that supposedly will be incurred if the Fourth Circuit's holding is affirmed, it is obvious that there is no cost involved in keeping a known suicidal subject at the booking desk pending transport to the hospital for an emergency psychiatric evaluation.

A. The Fourth Circuit Correctly Analyzed the Duty of Care Owed to Known Suicidal Detainees

If the Court should find that the issue is properly presented for consideration, it is clear that the Fourth Circuit correctly disposed of this issue. Although the Buffingtons had argued that the issue should not be considered in light of the fact that it was raised for the first time on appeal (Appellees' Brief at p. 30), the Fourth Circuit nevertheless addressed the merits. The *DeShaney* argument presented in the Fourth Circuit was a significantly different argument than now presented to this Court.[6] As noted by the Fourth Circuit, the officers contended in the circuit court that no constitutional duty was owed to a person who was in police custody as the result of a family request for assistance as distinct from the duty owed to a suicidal prisoner as the result of an arrest for criminal violation or by virtue of a conviction. For ease of reference, this argument is referred to as the "*DeShaney*-family request/no arrest" argument. The Fourth Circuit stated the officers' argument as follows:

> Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide when the state has intervened not to enforce criminal law, but at the request of family members to protect the person from causing harm to himself. We reject this argument.

Petition Appendix at 8a. The Fourth Circuit correctly recognized that the officers had misread *DeShaney*:

> The appellants argue that under the rationale of *DeShaney*, there was no affirmative duty of care on the part of any state actor in this case because the

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[6] The officers' Fourth Circuit brief conceded that there is a "substantial corpus of law" recognizing the "prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment." (App. 54a).

> intervention to protect Buffington was at the instance of private parties. This is a misreading of *DeShaney*. Distinguishing prior cases in which it had found affirmative constitutional duties of protection from the situation in *DeShaney*, the Court explained that in those earlier cases it was the fact of state *custody* that triggered at least some duty of care on the part of the state: '[W]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.' *Id.* 109 S.Ct. at 1005-06 (citations omitted). Nothing in the Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody. . . . Nor do we read *DeShaney* or other cases as implying that it is relevant to the existence of the duty whether a state or private actor brought the need for custody to the state's attention. *See Youngberg*, 457 U.S. at 309, 102 S.Ct. at 2454 (involuntarily committed mental patient's mother sought son's commitment because she was unable to care for him or control his violence). In short, we see no basis for adopting the categorical rule urged by appellants that the state owed no duty of care to Buffington under the circumstances of this case. We hold that the due process clause did impose an affirmative obligation on the state to provide some measure of care here.

Petition Appendix at 9a-10a. *DeShaney* involved a child's § 1983 claim against a county department of social services for its failure to protect him against his father's violence. The Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process

Clause." 109 S.Ct. at 1004. The Court based its holding on the fact that the harm to the child "did not occur while he was in the State's custody, but while he was in the custody of his natural father . . . ." *Id.* at 1006. This fact distinguished the case from other situations where the Court has found duties of care. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the Eighth Amendment requires the provision of adequate medical care to prisoners.[7] The Court in *DeShaney* noted that *Youngberg v. Romeo*, 457 U.S. 307 (1982), similarly held that the Fourteenth Amendment requires the State to provide involuntarily committed mental patients with services necessary to insure their "reasonable safety." *Id.* at 314-324. The Court also noted the holding in *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), that the Due Process Clause requires government officials to provide medical care to suspects in police custody.[8] The Court in *DeShaney* stated that these cases "stand . . . for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-

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[7] In *Estelle*, the Court held that "deliberate indifference to a serious medical need of a prisoner violates the Eighth Amendment." 429 U.S. at 104. "Deliberate indifference" exists when action is not taken in the face of "a strong likelihood, rather than a mere possibility" that failure to provide care would result in harm to the prisoner. *E.g., State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983).

[8] The Eighth Amendment's protection applies only to prisoners incarcerated as a result of a criminal conviction. *Ingraham v. Wright*, 430 U.S. 651, 668-671 (1977). There exists an equivalent substantive right under the Due Process Clause of the Fourteenth Amendment which protects pre-trial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Eighth Amendment standards are used by analogy to determine the rights of a detainee. *E.g., Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1980).

being." 109 S.Ct. at 1005. Thus it is the fact of custody alone which triggers the obligation to provide medical care. Accordingly, in this case the officers had a constitutional duty to provide Buffington with such protection.[9]

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[9] The courts have uniformly recognized that § 1983 liability can be premised on deliberate indifference to a known suicidal detainee. *See Burns v. City of Galveston*, 905 F.2d 100, 103 (5th Cir. 1990) (deliberate indifference to serious medical needs of suicidal pretrial detainee constitutes due process violation); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (a jailor with knowledge of detainee's suicide risk can be charged with deliberate indifference); *Lewis v. Parish of Terrebone*, 894 F.2d 142, 145 (5th Cir. 1990) (warden at jail had clear and well-established constitutional duty to protect a prisoner prone to suicide from self-destruction); *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989) (failure of prison staff member to notify competent officials of inmate's dangerous psychiatric state can constitute deliberate indifference); *Edwards v. Gilbert*, 867 F.2d 1271, 1276 (11th Cir. 1989) (deliberate indifference standard is met if there is a strong likelihood that self-infliction of harm would result from failure to act); *Colburn v. Upper Darby Township*, 838 F.2d 663, 668-69 (3d Cir. 1988), *cert. denied*, 103 L.Ed.2d 808 (1989) (even where the acts causing the injury were those of the prisoner, herself, police officers had duty to protect openly suicidal pretrial detainee); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1181 (5th Cir. 1986) (failure to take any steps to save openly suicidal detainee from injuring himself constitutes a due process violation); *Roberts v. City of Troy*, 773 F.2d 720, 724 (6th Cir. 1985) (§ 1983 claim is established when suicidal detainee alleges that official failed to take steps in the face of a pervasive risk of harm); *Bell v. County of Washington*, 741 F. Supp. 1354, 1360 (S.D. Iowa 1990) (if jailer is aware of prisoner's particular vulnerability to suicide, the Fourteenth Amendment imposes the obligation on him not to be deliberately indifferent to that vulnerability); *Jackson v. City of Chicago*, 645 F. Supp. 926, 927-28 (N.D. Ill. 1986) (detainee in known state of mental distress entitled to medical care); *Strandell v. Jackson County*, 634 F. Supp. 824 (S.D. Ill. 1986) (where suicidal detainee was in obvious state of mental suffering there was a duty to provide medical care); *Holland v. Breen*, 623 F. Supp. 284 (D. Mass. 1985) (complaint stated a cause of action for violation of due process rights where pretrial detainee was in obvious danger of committing suicide); *Madden v. City of Meriden*, 602 F. Supp. 1160 (D. Conn. 1985) (police officers who failed to protect detainee with

II. THE QUALIFIED IMMUNITY DEFENSE WAS NOT PRESERVED AT TRIAL

Petitioners further assert that the Buffingtons' § 1983 action against the officers "should have been dismissed as barred by qualified immunity." Petition at p. 14. Petitioners rely upon the Sixth Circuit's decision in *Danese v. Asman*, 835 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990). Petitioners assert that "[e]ven if due process does create a constitutional duty to prevent a suicide, it clearly was not a duty so firmly established in 1987 that liability can be imposed for breach of that duty by these officers." Petition at p. 14. The officers contend that the Buffingtons' § 1983 claims are barred by qualified immunity and that the Fourth Circuit erred when it found that the defense had been waived.

Prior to addressing whether the officers preserved the defense of qualified immunity, a brief discussion of the elements of this defense will provide some context to the waiver issue. An analysis of the qualified immunity defense begins with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow* the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages inso-

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known history of suicide liable for violation of due process rights); *Guglielmoni v. Alexander*, 583 F. Supp. 821 (D. Conn. 1984) (constitutional duty exists to protect openly suicidal inmate from himself); *see also Darling v. Augusta Mental Health Institute*, 535 A.2d 421 (Me. 1987) (deputy sheriffs had duty to provide for openly suicidal inmate's serious medical needs); *Seiler v. City of Bethany*, 746 P.2d 699 (Okl. App. 1987) (prison officials had duty to provide for serious medical needs when faced with strong likelihood of prisoner's suicide); *Miga v. City of Holyoke*, 398 Mass. 343, 497 N.E.2d 1 (1986) (police officer's conduct in failing to protect openly suicidal pretrial detainees could constitute deliberate indifference in violation of due process rights); *Brewer v. Perrin*, 132 Mich. App. 520, 349 N.W.2d 198 (1984) (police could be held liable for the failure to provide medical attention to openly suicidal pretrial detainee).

far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The *Harlow* Court established an objective standard to make summary judgment appropriate where an official has violated a plaintiff's constitutional rights—if they were not then "clearly established" or if a "reasonable person" in the official's position could have failed to understand that his conduct violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). A qualified immunity defense thus has three aspects to it:

> In analyzing a claim of qualified immunity it is therefore necessary first to identify the specific constitutional right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, and then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right.

Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). With these basic principles in mind, the analysis can now turn to whether the officers actually raised a qualified immunity defense in this case.

The defense of qualified immunity was not raised in their first responsive pleading. The officers' two-page "Motion to Dismiss or, In the Alternative, Motion for Summary Judgment" reveals no discussion of qualified immunity. (App. 1a-2a.) In fact, the words "qualified immunity" are absent. Although the memorandum accompanying that motion did cite *Harlow*, the officers focused exclusively upon the absence of a constitutional duty to protect *latently* suicidal detainees. (App. 4a). The officers argued that a *latently* suicidal detainee had no constitutional right to be protected from committing suicide while in police custody. This argument was based on a gross misreading of the Buffingtons' Complaint (*see*

Apx. 26-34), which manifestly alleged that James Buffington was *openly and obviously* suicidal while in police custody. Their motion proceeded to mischaracterize the Complaint as alleging a duty to discover and protect against a detainee's *latent* suicidal tendencies. (App. 4a-8a). Based on this false premise, they argued that the Complaint alleged *mere negligence* and for that reason failed to state a due process violation. (App. 9a-10a).

The officers' memorandum in support of summary judgment stated that, in order for the Buffingtons to have a viable § 1983 action, "the Plaintiffs must allege facts sufficient to present a clearly established constitutional duty to discover the *latent* suicidal tendencies of the Deceased and/or to deprive the Deceased of the means of taking his own life." (App. 4a) (emphasis added). In a strained effort to portray this case as one of mere negligence, their memorandum then repeatedly denied that James Buffington had any serious medical needs or that he was at risk to commit suicide. (App. 7a, 9a). In rejecting this mischaracterization of the Complaint, District Judge Joseph C. Howard held that the Complaint did state a viable due process claim under § 1983 (App. 65a-68a), and that "plaintiff's Complaint, far from defendants' characterization as *latent* suicidal tendencies by Buffington, reveal that, if taken as true, the defendants had ample notice of Buffington's ability to take his own life." (App. 67a) (emphasis in original). Construing the allegations, the district court noted that "Buffington's suicidal tendencies were not latent; they were ubiquitous." (App. 68a).

The officers moved to reconsider the district court's ruling. The words "qualified immunity," however, appear nowhere in their motion for reconsideration. (App. 69a-70a). In fact, the officers persisted in their argument that the Complaint alleged negligence, not an action maintainable pursuant to § 1983. This argument was premised on the officers' continuing refusal to ac-

knowledge that the Buffingtons' Complaint alleged that Buffington was openly and acutely suicidal:

> The Defendants respectfully disagree that the Decedent, David (sic) Buffington's suicidal tendencies were obvious to the officers . . . . *He showed no inclination to take his own life between the time of his apprehension and the time he was placed in the holding cell.* Given these facts, it is submitted that none of the officers involved in arresting or processing the Decedent acted in any way to deprive him of Due Process Rights under the 14th Amendment. *There is no indication that Mr. Buffington was, in the least, overtly suicidal during any phase of his detention.*

(App. 69a-70a) (emphasis added). Significantly, the officers then conceded that a constitutional violation would have been stated if the officers had known that James Buffington was openly suicidal: *"Clearly, if the officers knew of Mr. Buffington's suicidal tendencies and had done nothing to secure medical attention, a claimed violation of his constitutional rights would have been stated."* (App. 70a) (emphasis added).

The motion for reconsideration was denied on July 11, 1988. Apx. 159. The officers did *not* seek an immediate appeal. It was not until October, 1988 that they attempted to appeal by way of a "Motion to Amend Interlocutory Order." However, this attempted appeal contained *no reference whatsoever* to a qualified immunity defense. (App. 71a-74a). The district court denied the motion. Approximately one week before trial, the officers noted a second appeal pursuant to 28 U.S.C. § 1291 and moved to stay the proceedings. Apx. 4; 220-24. The district court denied the request for a stay, finding that defendants had "never raised" the issue of qualified immunity. (App. 75a). Similarly, former Fourth Circuit Chief Judge Winter declined to stay the proceedings pending appeal. Judge Winter stated: "Because I am in agreement with the district court that the defense of

qualified immunity has not been raised, and for the further reason that I do not see how qualified immunity applies in this case, I concluded to deny the stay." (App. 76a).

Contrary to the pretrial position of the defense lawyers, the officer defendants (and other police witnesses not named as defendants) testified uniformly of their awareness that Buffington was *openly* suicidal and in imminent danger of self-destructive behavior. *E.g.*, Apx. 1341; 1375-77; 1405-07; 1414-15. In returning a verdict against Officers Gaigalas and Tucker the jury necessarily found that these officers were aware that Buffington was openly suicidal. *See* Instructions (App. 38a). As the Fourth Circuit correctly observed, the officers have not assigned error to the refusal by the district court to give their requested instruction on qualified immunity. Petition Appendix at 15a.

At the close of evidence at trial the officers moved for directed verdict. The motion did not invoke qualified immunity as a defense to the § 1983 claim.[10] The district court reserved ruling on the motion for directed verdict. As the Fourth Circuit observed:

> After the jury returned verdicts under § 1983 against some of the individual defendants, those defendants moved for j.n.o.v., asserting, *inter alia*, in the motion itself that they were entitled to qualified immunity. *In their supporting brief, however, they made no argument whatsoever on this point* . . . . As with the refusal to give the qualified immunity instruction, the appellants have not on appeal assigned error to

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[10] The motion for directed verdict did assert "good faith immunity" as to Chief Behan. (App. 31a-32a). It also asserted, "[a]s to the state law claims" (App. 34a), the public official immunity of the officers applicable to nonmalicious acts. (App. 35a). At no point in moving for directed verdict did Officers Gaigalas (App. 34a) or Tucker (App. 33a) invoke qualified immunity as a defense to the § 1983 claim.

> the denial of the motion for directed verdict or j.n.o.v.

Petition Appendix at p. 15a (emphasis added).

The Fourth Circuit properly concluded, for reasons stated, that the motion for j.n.o.v. was insufficient to preserve the issue of qualified immunity as a question on appeal. In addition, the Court of Appeals was correct for a more fundamental reason. Unlike *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir. 1988), on which the Petition relies so heavily (Petition at pp. 14, 15), the officers here did *not* specifically assert qualified immunity in their motion for directed verdict. (App. 33a-34a). This failure distinguishes *Rakovich* and precludes appellate review of that defense.[11]

Rule 50(a), Fed. R. Civ. P., mandates that a "motion for a directed verdict shall state the specific grounds therefor." Failure to raise an issue in a motion for directed verdict will preclude its assertion in a motion for j.n.o.v. *Federal Savings & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137 (4th Cir. 1987). As mentioned earlier, the failure to raise a question in a motion for directed verdict also waives appellate review of that question. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1058 (4th Cir. 1976). As was explained recently:

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[11] After the initial mistrial, defendants filed a "Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict." (App. 20a-21a). The text of the motion failed to set forth any specific ground for relief. Instead, it purported to adopt wholesale all of the arguments advanced at the prior trial. Although the accompanying memorandum uses the words "qualified immunity," the argument actually advanced cannot be characterized as a bona fide qualified immunity defense. Defendants actually stated therein (consistent with plaintiffs' position) that: "[e]valuating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date." (App. 25a).

> If a party fails to specify an issue in its motion for a directed verdict, it may not subsequently challenge the jury's verdict on that issue, which is conclusive on that point. A specific reference to the issue in a motion for judgment n.o.v. does not cure a prior failure to include the issue in the motion for a directed verdict and, thus, does not preserve the issue for review.

Kinzenbaw v. Deere & Co., 741 F.2d 383, 387 (Fed. Cir. 1984) (citations omitted), *cert. denied*, 470 U.S. 1004 (1985).[12]

It is significant that prior to the appeal, the officers never asserted that an openly and obviously suicidal detainee has no constitutional right to be protected from committing suicide while in police custody. In fact, the officers conceded below that they owed a duty to protect openly suicidal detainees from committing suicide. They did *not* argue that they were unaware of a constitutional right "that had not yet been declared." On the contrary, they readily acknowledged their duty to constantly mon-

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[12] *See Dow Chemical Corp. v. Weevil-Cide Co., Inc.*, 897 F.2d 481, 486 (10th Cir. 1990) (only questions raised in prior motion for directed verdict may be pursued in motion for j.n.o.v.); *Heller v. Champion Int'l Corp.*, 891 F.2d 432, 436 (2d Cir. 1989) (because motion for j.n.o.v. is a renewal of motion for directed verdict, it cannot assert a new ground for relief); *Hilord Chemical Corp. v. Ricoh Electronic, Inc.*, 875 F.2d 32, 37-38 (2d Cir. 1989) (motion for j.n.o.v. could not assert ground not included in motion for directed verdict); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 292 n.5 (5th Cir. 1989) (party cannot base motion for j.n.o.v. on grounds not included in motion for directed verdict); *E.E.O.C. v. State of Del. Dept. of Health & Social Services*, 865 F.2d 1408, 1414 n.9 (3rd Cir. 1989) (additional arguments for j.n.o.v. not raised in directed verdict motion cannot be considered); *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987) (grounds not raised in motion for directed verdict may not later be raised in motion for j.n.o.v.); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035 (1st Cir. 1984) (party may not base its motion for j.n.o.v. on ground that was not argued in its motion for directed verdict).

itor known suicidal detainees. They asserted that "every police officer, summoned by Appellees to testify, *already knew* [that] suicidal persons should be kept under constant observation at all times and not isolated." (App. 57a) (emphasis added).

On appeal, however, the officers abruptly changed course. Although they finally acknowledged the overwhelming evidence that James Buffington was openly suicidal, they concocted an argument, raised for the first time on appeal, that there was no duty to protect even an openly suicidal person when that person "has come into the custody of state agents as a result of a request for emergency assistance by the family." (App. 54a).

Prior to the filing of the petition for certiorari, the officers have never argued that as of the date of James Buffington's suicide on March 19, 1987, the officers did not know that failing to safeguard an openly suicidal person would violate that person's constitutional rights. In fact, at trial, Officer Gaigalas re-affirmed his deposition testimony that, because of the extreme danger, it would be "almost criminal" to knowingly place an obviously suicidal subject into a cell under the circumstances of this case.[13] (Apx. 1410-11).

Because of the overwhelming evidence that the officers were aware that Buffington was suicidal, the appellants elected to reverse their field on appeal. In fact, on appeal, the lead issue (as framed by the officers) was pre-

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[13] Because no Baltimore County police officer has ever been disciplined for failing to safeguard openly suicidal detainees, Apx. 1641, Gaigalas obviously acted with impunity in placing Buffington in a cell. In fact, despite the inherent danger of such a rule, a Department S.O.P. actually required placing self-destructive detainees in an individual cell. (Apx. 1752). As reflected in the jury's verdict against Baltimore County and Chief Behan, the Police Department's exoneration of Gaigalas and Tucker, *e.g.*, Apx. 1532; 1976, condoned their deliberate indifference towards Buffington, and evidenced an unconstitutional policy and custom of failing to safeguard patently suicidal detainees.

mised on the fact that the officers had an obviously suicidal person in custody as a result of a request by the detainee's family to protect that person from suicide:

> 1. Is there a right which exists pursuant to the Fourteenth [sic] Federal Constitution which guarantees an individual, in the police custody as a result of a request for assistance from the family, protection by the State from suicide?

(App. 52a).[14] Their brief discarded the "latent suicide" theory:

> *Gaigalas' act was done with knowledge of decedent's condition.* (Apx. 1407-08). Despite the fact that Gaigalas knew of other similar occurrences and should have appreciated the consequences that might result (Apx. 1402-05), Gaigalas still placed the decedent into the cell.

(App. 57a) (emphasis added).

Thus, on appeal the officers abandoned the argument that Buffington was merely *latently* suicidal. Instead, the officers conceived of their entirely novel "*DeShaney*-family request/no arrest" argument, presented on appeal for the first time. In essence they argued that under *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), there was no duty to protect a person from suicide "when a person has come into the custody of state agents as a result of a request for emergency assistance

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[14] The officers began their own statement of facts as follows: "On March 19, 1987, at 4:30 in the morning, *James Buffington made manifest his intention to take his own life* (Apx. 1077)." Appellants' Br. at 5 (emphasis added). The officers' abandonment of the "latent suicide" theory is evident in their following summary of the facts: "Here, the record is clear that James Buffington came into the custody of Baltimore County police officers upon the receipt of a request for emergency assistance by James' brother and sister-in-law . . . . Police began to prepare the paperwork associated with the incident, including a petition for an emergency psychiatric evaluation at a local hospital. (Apx. 1124-1201)." (App. 54a).

by the family." (App. 53a). However, the officers *conceded* that "*[t]here is also a substantial corpus of law among federal circuit and district courts which have recognized the prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment. See, e.g., Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1988)." (App. 54a) (emphasis added).

It is in this context that the officers now contend that their opening brief advanced a qualified immunity argument. This argument was presented in two sentences, followed by a one-sentence conclusion:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist. . . . Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

(App. 56a) (citations omitted).

The Fourth Circuit was correct in concluding that, even if Gaigalas and Tucker preserved the defense of qualified immunity in the trial court, their brief failed to present that issue for appellate consideration:

> Part II of the appellants' brief mentions qualified immunity for the officer defendants, but hinges the argument wholly on the lack of a constitutional violation—it does not assert that these defendants were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. . . . Even under a generous reading of this argument, it does no more than assert that these individual defendants were entitled to qualified immunity because, *on the merits*, there was no constitutional violation. . . .

Petition Appendix at p. 13a (emphasis in original).

In their Petition, the officers complain of the Fourth Circuit's "refusal to consider" the qualified immunity issue. Petition at p. 15. This criticism of the lower court is unjustified. It is settled as a matter of federal appellate procedure that an issue raised in an opening brief, but not supported by argument, is deemed abandoned. Rule 28(a)(4), Fed. R. App. P. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 110 S.Ct. 1814 (1990); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Jungels v. Pierce*, 825 F.2d 1127, 1130 (7th Cir. 1987); *Tallahassee Mem. Regional Med. Center v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

The Fourth Circuit observed that "the Buffingtons justifiably interpreted the qualified immunity issue raised by these defendants as simply duplicative of the merits issue, and so addressed only the merits." Petition Appendix at 13a. In preparing their own brief, the Buffingtons were "entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983). The Court of Appeals thus concluded:

> In sum, we do not think the appellants have properly preserved and raised in this court an issue of qualified immunity distinct from the question of whether a constitutional violation occurred. We decline to consider such an issue *sua sponte*.

Petition Appendix at 15a. Given the *additional* failure of the officers to properly raise and preserve this issue in the trial court, granting the petition for writ of certiorari at the behest of those officers would allow this case to be decided on a ground never presented before in any meaningful sense. As did the Fourth Circuit, the Court should not permit litigants to blow hot and cold on the issues which they present for adjudication.

An examination of the record in this case discloses an attempt to persuade the Court to decide the case on an issue raised for the first time in the officers' Fourth Circuit reply brief. Relying upon *Danese v. Asman*, 835 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990), the reply brief claimed that the holding of *Danese* "with regard to qualified immunity *is directly on point* and, if applied, requires dismissal of claims against the individual appellants." (App. 79a) (emphasis added). The reply brief's reliance on *Danese v. Asman* represented an attempt to inject the defense of qualified immunity into this case for the first time. Obviously, the Fourth Circuit was correct in holding that issues cannot be raised for the first time in a reply brief.

The officers' procedural error in this regard is matched by the equally erroneous description of the holding in *Danese v. Asman*. The officers' Petition asserts: "[i]n *Danese* the Sixth Circuit held that, as a matter of law, there is no due process right to be protected from suicide." Petition at p. 11. Unlike the instant case, *Danese* involved a situation involving a *latently* suicidal detainee. In *Danese* the circuit court noted that "the 'right' that is truly at issue here is the right of a detainee to be *screened* correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide." 875 F.2d 1244 (emphasis added). The *Danese* court stated that "[*i*]*t is one thing to ignore someone who has a serious injury and is asking for medical help*; it is another to be required to *screen* prisoners correctly to find out that they need help." (emphasis added). *Id.* In finding the defense of qualified immunity applicable the court in *Danese* concluded:

> The court below did not cite any cases showing that the officers had the constitutional *duty to determine if Danese was seriously inclined to commit suicide and then stop him. The story might be different if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had*

> *told them he needed psychological help. If a prisoner asks for or needs medical care, it must be supplied.*

Id. at 1244 (emphasis added).

Reliance on *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987), is also totally inappropriate. *Gagne* involved an arrest for public intoxication. The Fifth Circuit stated:

> In this case, which arose from a jail suicide on May 17, 1983, we hold that the arresting officer *was not under a clearly established constitutional duty to discover the prisoner's suicidal tendencies* or to deprive him of the means of killing himself.

805 F.2d at 559 (emphasis added). In rejecting a qualified immunity defense in *Lewis v. Parish of Terrebone*, 894 F.2d 142, 145-46 (5th Cir. 1990), the Fifth Circuit noted that "[t]he custodian in *Gagne* had no knowledge of suicidal tendencies harbored by the detainee," and held that a detainee with known suicidal tendencies requires protective action by custodial officers.[15]

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[15] Even the cases cited by the Petitioners uniformly hold that there is a constitutional duty to protect suicidal persons to the extent that officials are on notice of risk of harm. *See Greason v. Kemp*, 891 F.2d 829, 835-36 (11th Cir. 1990) ("where prison personnel directly responsible for inmate care have knowledge that an inmate has attempted, or even threatened suicide, their failure to take steps to prevent that inmate from committing suicide can amount to deliberate indifference"); *Dorman v. District of Columbia*, 888 F.2d 159, 163 (D.C. Cir. 1989) (municipality can be held liable in a detainee suicide case where there is knowledge of the harm); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990) (where police have notice that detainee was suicidal and were indifferent to his medical needs, claim for violation of due process rights is stated); *Freedman v. City of Allentown*, 853 F.2d 1111, 1115 (3d Cir. 1988) (when police officers actually know of suicidal tendencies of a prisoner and fail to take reasonable precautions, due process rights have been violated); *State Bank of St. Charles v. Camic*, 712 F.2d 1140 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983) (where officials have actual knowledge that detainee is a suicide risk and do not take reason-

The instant case does not involve the question of whether the officers should have discovered whether James Buffington had a *latent* suicidal tendency. They received a 911 call for the specific purpose of preventing his imminent suicide. Thus assuming *arguendo* that the officers raised a qualified immunity defense and did not waive or otherwise abandon it, it is nevertheless clear that, on the merits, it should be rejected as frivolous.

CONCLUSION

For the foregoing reasons, the Buffingtons respectfully request that the Court deny the Petition.

Respectfully submitted,

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February 12, 1991

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able precautions to guard against self-inflicted harm, due process claim is stated).

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,
Defendants.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

[Filed Jan. 20, 1988]

Baltimore County, Maryland, Chief Cornelius J. Behan, Sergeant Daniel Yuska, Corporal Joseph Gribbin, Officer L. S. Harvey, and Officer Donald Gaigalas, Defendants, by their undersigned counsel, move pursuant to Rule 12b of the Federal Rules of Civil Procedure to dismiss the within Complaint, or, in the alternative, move, pursuant to Rule 56, for summary judgment in their favor as a matter of law and, state as follows:

1. That the within Complaint fails to state a cause of action upon which the relief prayed can be granted.

2. That this Court does not have jurisdiction over the claims asserted in the Complaint.

3. That the Complaint fails to state causes of action upon which the relief prayed can be granted against these Defendants.

4. That as to the Defendant, Baltimore County, Maryland, a body corporate and politic of the State of Maryland, it is immune with respect to the cause or causes of action presented in the Complaint.

5. That the individual Defendants are immune with respect to the claims presented in the within Complaint.

6. That this Court has no jurisdiction over the pendant state law claims, which fail to state causes of action against these Defendants, as a matter of law.

7. That there is no dispute as to any material facts with which the claims presented in the Complaint are concerned, and therefore, these Defendants are entitled to summary judgment in their favor as a matter of law.

For the reasons stated, the Defendants respectfully request that this Honorable Court dismiss the within Complaint, or, in the alternative, that this Court enter summary judgment in their favor as a matter of law, assessing costs and expenses against the Plaintiffs as appropriate.

/s/ Arnold Jablon
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/s/ John A. Austin
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

Baltimore County, Maryland, et al., Defendants, by their undersigned counsel, submit the following Memorandum to assist the Court in its consideration of the issues presented by the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed concurrently in these proceedings on behalf of these Defendants.

The Plaintiffs, as the parents and Personal Representative of the late James E. Buffington, have filed with this Court, a thirty-six page Complaint asserting claims under 42 U.S.C. Section 1983, in Counts I and II, on behalf of themselves and the Decedent, and pendant state law claims for wrongful death and survival in Counts III and IV, on behalf of themselves and the Decedent. Notwithstanding the sophistic verbiage in the seventy-eight paragraphs of the Complaint, the essence of the Plaintiffs' claims is a theory of negligence on the part of the Defendants. Essentially, the Plaintiffs' claims are to the effect that the Defendants, and specifically the individual police officers, negligently failed to prevent the Deceased, James E. Buffington, from hanging himself while confined in a precinct holding cell at the Wilkens Station, follow-

ing his arrest for the burglary of his parents' home. (*See* Paragraphs 30-34 of the Complaint). However, because the claims for negligence as framed by the four counts of the Complaint are barred by various immunities that are applicable to the Defendants, the Complaint should properly be dismissed at this time.

Claims Under 42 U.S.C. Section 1983

Plaintiffs have presented separate claims on behalf of the Decedent, James E. Buffington and on behalf of themselves as surviving parents pursuant to 42 U.S.C. Section 1983. Addressing these claims in reverse order, the Plaintiffs under Count II have alleged standing to bring a direct action under Section 1983 on behalf of themselves as the parents of the Deceased, James E. Buffington, and have alleged a deprivation of their constitutional rights to enjoy the association, companionship, and relationship with the Decedent. Otherwise stated, Count II is an effort to present a federal, wrongful death and survivor claim on behalf of the Plaintiffs as parents of the Deceased. Such claims are clearly not within the scope of Section 1983 and must be brought, if at all, pursuant to applicable state law tort theories. With respect to the claims presented under 42 U.S.C. Section 1983, a plaintiff must allege facts sufficient to establish a violation of some protected federal constitutional right of the plaintiff, clearly established the time of the occurrence, which is the subject of the Complaint. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Applying this rule to the case at bar, the Plaintiffs must allege facts sufficient to present a clearly established constitutional duty to discover the latent suicidal tendencies of the Deceased and/or to deprive the Deceased of the means of taking his own life. The existence of such a clearly defined constitutional duty was addressed squarely and rejected by the United States Court of Appeals for the Fifth Circuit in the leading case of *Gagne v. City of Galveston*, 805 F.2d 558

(5th Cir. 1986). In that case, the Court of Appeals for the Fifth Circuit dismissed claims factually and legally identical to the claims in the case at bar, using the following language:

> "The only factual allegations against Putnal (the arresting officer) that are remotely relevant to the claimed deprivation of constitutional rights are that Putnal failed to remove the decedent's belt and that the decedent was not placed under 'heightened surveillance' at the jail. The plaintiffs have not cited any case suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested. Indeed, the case of *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. Thus, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the claim against Putnal must be dismissed."

The claims in the *Gagne* case were brought by Gagne's estate and survivors under 42 U.S.C. Section 1983. Identical claims have been brought by the Plaintiffs as the surviving parents of James E. Buffington under Count II. A careful examination of the allegations of the Complaint clearly demonstrate that the within case is squarely within the holding of the Fifth Circuit in the *Gagne* case and therefore, Count II should properly be dismissed.

The well-pleaded facts presented in the Complaint filed in these proceedings recite that the Plaintiff's Decedent, James E. Buffington, was placed in a cell in the Wilkens Station and at some point in time between approximately 6:25 and 7:20 a.m., he committed suicide by hanging himself in a noose fashioned from his own pants. (*See* Paragraph 46). From the other allegations of the Complaint, it appears that prior to being placed in the cell

that the Decedent's belt, shoes, shoelaces, and other similar articles of clothing had been removed from him leaving him with only his shoes, socks, pants, shirt and undergarments. The Complaint also alleges that although the Decedent had left a suicide note and had previously displayed emotional instability that at the time of his apprehension, he advised the officers that he did not intend to end his life, even though he was at that time in the possession of several handguns and two rifles, and apparently a sufficient quantity of ammunition for all of these weapons. (*See* Paragraphs 35 and 36). Although it is alleged without specificity that the Decedent, James E. Buffington, had been drinking (Paragraph 36), there is no further allegation in the Complaint that the Decedent was intoxicated, there being only a statement that his judgment was impaired by alcohol. (*See* Paragraph 42). By contrast with the facts as alleged within Complaint, the Plaintiff in the *Gagne* case was arrested for public intoxication, was apparently extremely intoxicated, and was placed in a cell block without first removing his belt. This action violated the Departmental policies of the Police Department of the City of Galveston, and as a result, the belt was used as a noose by the Plaintiff, Gagne, to take his own life. Further, the Plaintiff, Gagne, apparently had scars on one wrist from a prior suicide attempt which was apparently known to the arresting officers.

By comparison with the case at bar, there are no allegations in the Complaint that the Decedent, James E. Buffington, had ever previously attempted suicide and the contents of the alleged suicide note are not made a part of the Complaint so as it is not possible to evaluate whether or not that note, in and of itself, would have been sufficient to put the officers on any additional notice regarding the suicidal tendencies of the Decedent. However, notwithstanding the contents of the note, the Complaint plainly alleges that the officers were in fact in the process of preparing the necessary paperwork for an emergency commitment of the Decedent prior to and at

the time he took his own life. (*See* Paragraph 37). It is plain that the Complaint alleges no need for the Decedent to have been continuously monitored as he had displayed no unusual actions after being taken into custody and indeed, the Complaint itself describes him as being "thoroughly docile and submissive" during the processing at Wilkens Station. (*See* Paragraph 38). In short, the Complaint clearly alleges facts that establish that there was no basis for the arresting officers to conclude that the Decedent present any unusual risk to himself. Thus, there are no facts alleged in the within Complaint that would remove this case from the holdings in the *Gagne* case, nor are there any additional factors present that would require a different result than that reached by the Court in *Gagne*. There being no factual basis upon which to conclude that the officers who handled Mr. Buffington were under a constitutional duty to prevent him from taking his own life, there can be no actionable violation of Section 1983 as a result of his suicide.

In apparent recognition of this factual and legal problem, the Plaintiffs have attempted to allege a deprivation of the constitutional rights of the Decedent by alleging a violation of his Sixth Amendment rights as a result of claimed deliberate indifference to his serious medical needs. The bald, unsubstantiated allegations of the Complaint attempt to bring this case within the case law standards regarding medical care of inmates. However, it is clear that the facts of the case at bar do not present an actual claim for deliberate indifference to serious medical needs.

The Plaintiffs' claims are asserted in a guise that would attempt to bring them within the confines of the case law principles established by the leading decision of the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that deliberate indifference to serious medical needs by institutional staff constituted cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. In *Estelle v. Gamble*,

supra, the Supreme Court, in analyzing a physician's diagnostic treatment of a confined inmate, held plainly that the standard to be applied, deliberate indifference, was to be distinguished from a mere negligence standard, and distinguished between a claim for deliberate indifference and a claim of medical malpractice. In making this distinction, the Court held:

> "A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice cannot become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 109.

This distinction between deliberate indifference and mere negligence has been carried forward by the more recent decisions of the Supreme Court in *Davidson v. Cannon*, 474 U.S. —— (1986) and *Daniels v. Williams*, 474 U.S. —— (1986), where the Supreme Court held that a claim for simple negligence or lack of due care does not state an actionable constitutional claim under 42 U.S.C. Section 1983. Specifically, the Supreme Court in *Davidson v. Cannon, supra*, held as follows:

> "Respondents' lack of due care in this case led to serious injury, but that lack of due care simply does not approach the sort of abusive government conduct that the due process clause was designed to prevent. *Daniels*, slip opinion, at page 4-6. Far from abusing governmental power, or employing it as an instrument of oppression, Respondents mistakenly believe that the situation was not particularly serious and Respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the statements guarantee due care on the part of its officials."

The inescapable thrust of these holdings by the United States Supreme Court is that negligent conduct on the

part of a public official cannot form the basis for a claim under Section 1983. This is true whether the claim is presented under the Eighth Amendment with respect to a confined inmate or under the Fourteenth Amendment with respect to a pretrial detainee, such as the Plaintiff's Decedent. The Complaint in the within proceedings, although repeatedly phrasing "deliberate indifference", is lacking in factual substantiation that would give rise to such claims. Indeed, certain of the paragraphs of the Complaint clearly state that the cause of action is for negligent conduct on the part of the Defendants. *See*, for example, Paragraphs 49, 68, 71, and 76, all of which speak in terms of the Defendants' negligently failing to fulfill an alleged duty to the Decedent. The bald, unsubstantiated allegations of deliberate indifference notwithstanding, the factual circumstances that led up to the death of the Decedent as described in the Complaint, clearly indicate that there was no indication that the Plaintiff had any serious medical needs or that he was at risk to take his own life. Indeed, notwithstanding the ingestion of alcohol, the Complaint describes the Plaintiff Decedent as being "thoroughly docile and submissive."

Taking the allegations of Counts I and II and of the Complaint as a whole in a light most favorable to the Plaintiffs' cause, the only claims that is presented is that the Defendants negligently failed in their attempt to prevent the Plaintiffs' Decedent from committing suicide by failing to secure for him psychiatric care in time to prevent him from taking his own life. However, these claims likewise fail to state a cause of action. In the leading decision of *Jackson v. City of Jolliet*, 715 F.2d 100 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), claims presented under Section 1983, were dismissed for failure to state a claim in the following language:

> "We hold that an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment

> when the attempt fails because of the negligence, or even gross negligence of the officers or their supervisors, and the accident victim dies." 715 F.2d 1200, at 1206.

The Court in *Jackson v. City of Jolliet, supra,* dismissed claims presented through the Fourteenth Amendment for negligent action of the governmental officials in effecting a rescue attempt. A Petition for Certiorari was filed with the Supreme Court and was denied. However, the application of the principles of *Jackson* to the case at bar is clear. An attempt by state officers to prevent a suicidal subject from taking his own life is not actionable under Section 1983 through the Fourteenth Amendment when the efforts of the officers fail because of their negligence or even gross negligence, and the suicidal subject, through determined effort, succeeds in taking his own life. It is respectfully submitted that a straightforward application of the applicable principles of law demonstrate that state officers such as the Defendants cannot be liable for negligent acts or omissions committed in the scope of their official duties. This is particularly true when the moving force behind the alleged constitutional deprivation is the Deceased himself. It is for these reasons as well as others noted herein that Counts I and II should now properly be dismissed as against all Defendants.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO DISMISS THE AMENDED COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

[Filed Sept. 8, 1988]

Baltimore County, Maryland, et al., Defendants, by the undersigned attorneys, move pursuant to Rule 12b of the Federal Rules of Civil Procedure to dismiss the Amended Complaint filed herein, or, in the alternative, move, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor as a matter of law and as grounds therefore state as follows:

1. That the Amended Complaint fails to state a cause of action against the named Defendants.

2. The Amended Complaint fails to state a cause of action, either under 42 U.S.C. Section 1983 or under the pendant State law claims presented in the various numbered counts of the Amended Complaint.

3. That as to the individual Defendants who are sued individually, no claims are stated in the Amended Complaint for any wrongful acts committed by them solely

in their individual capacities, as opposed to their official capacities, and therefore, the Amended Complaint should be dismissed against all Defendants in their individual capacities.

4. That as to each of the individual Defendants, public official immunity bars any State law claims presented in the Amended Complaint.

5. That as to the claims presented under 42 U.S.C. Section 1983, all of the individual Defendants have immunity with respect to the claims enumerated in the Amended Complaint.

6. That as to the Defendant, Baltimore County, Maryland, the Amended Complaint fails to state a cause of action against this Defendant as a body corporate and politic of the State of Maryland.

7. That to the extent that the several counts of the Amended Complaint purport to allege a cause of action for wrongful death and survivorship under 42 U.S.C. Section 1983, these claims should be dismissed as a matter of law.

8. That the pendant State law claims against the Defendant, Baltimore County, Maryland, are barred by the doctrine of governmental immunity.

9. That as to the individual Defendants there is no dispute as to any material fact with respect to their liability to the Plaintiffs and therefore, summary judgment is appropriate in their favor as a matter of law. The materials which set forth the undisputed material facts are attached hereto and incorporated by reference and are identified in the accompanying Memorandum of Points and Authorities.

10. That the claims for non-economic damages against all of the Defendants should be dismissed to the extent that these claims exceed the maximum of limit of Three Hundred Fifty Thousand Dollars ($350,000.00) established

by Section 11-108 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland.

11. That as to the claims presented for the first time in the Amended Complaint, that there was a constitutional violation as a result of the alleged inadequate or incomplete investigation that was conducted following the events described in the Amended Complaint, there is no constitutional right to have such an investigation conducted and thus, to the extent that these allegations purport to present claims under 42 U.S.C. Section 1983, these claims should now properly be dismissed.

12. The Amended Complaint should be stricken as it was filed without first securing leave of Court or consent of opposing parties as required by Rule 15(a) of the Federal Rules of Civil Procedure.

For the reasons stated, the Defendants respectfully request this Honorable Court pass an Order dismissing the Amended Complaint, or, in the alternative, entering summary judgment in favor of the Defendants as a matter of law, assessing costs against the Plaintiffs as appropriate.

/s/ Arnold Jablon
ARNOLD JABLON
County Attorney

/s/ James G. Beach III
JAMES G. BEACH, III
Assistant County Attorney

/s/ John A. Austin
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Attorneys for Defendant,
Baltimore County, Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

Baltimore County, Maryland, et al., Defendants, by their undersigned attorneys, submit the following Memorandum to assist the Court in its consideration of the issues presented by the Motion to Dismiss the Amended Complaint, or in the Alternative, Motion for Summary Judgment filed concurrently in these proceedings on behalf of these Defendants.

* * * *

Counts I and II of the Amended Complaint assert claims respectively on behalf of the estate of the Decedent for a deprivation of constitutional rights under 42 U.S.C. Section 1983, in Count I, and in Count II, claims under Section 1983 on behalf of the Plaintiffs as the surviving parents of the Decedent. As to Count II, the Amended Complaint fails to state a cause of action under Section 1983, for it fails to identify a recognized federally protected constitutional right that has been violated or denied to them as a result of their son's suicide. Specifically, in Paragraph 67 of the Amended Complaint, the Plaintiffs' attempt to allege a liberty interest in the continued relationship with their son, as well as a liberty interest in

the expectation of certain minimal standards of treatment for their son. Otherwise stated, the claims in Count II are not recognizable before this Court as a claim under Section 1983 for the alleged liberty interest identified in Count II simply does not exist as a matter of law. At no point in the Amended Complaint are there any allegations tending to establish the existence of some federally protected liberty interest flowing solely to the parents independent of their claims under Count I on behalf of their deceased son. Count II is plainly an effort to present a federal wrongful death and survivor claim on behalf of the Plaintiffs as the parents of the deceased, which claims are a duplication of the wrongful death and survivor claims presented in Counts III and IV under State law tort theories. However, the Plaintiffs have failed to allege facts or to recite case law precedent establishing a protected Fourteenth Amendment liberty interest as alleged in Count II. Indeed, the leading cases are to the contrary. *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir., 1985) ; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ; *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir., 1986). The claims presented by the Plaintiffs under Count II plainly do not exist as a matter of law, and therefore, Count II should properly be dismissed.

With respect to Count I, which alleges direct claims on behalf of the Decedent's estate under Section 1983, it is to be noted that all of the individual Defendants are sued in their official capacities as members of the Baltimore County Police Department. In substance, the claims presented in Count I allege that the individual Defendants were either negligent in their handling of, or deliberately indifferent to, the medical needs of the Plaintiff's Decedent with respect to his needs for psychiatric treatment as demonstrated through his overtly suicidal behavior. The Amended Complaint further alleges that the negligent or deliberately indifferent activities were the result of inadequate training and supervision by the Defendants Kramer and Behan, were the product of the

alleged inadequacies of the lockup facilities themselves, or were the product of the alleged inadequacies in the Departmental Rules and Regulations. All of these factors the Amended Complaint alleges proximately caused the suicide of James Buffington by resulting in his being placed by himself in the cell where he ultimately committed suicide.

Focusing for the moment only upon the individual police officer Defendants, it is beyond dispute that none of these individual officers are alleged to nor could have had any responsibility for the implementation of policies, rules or regulations for the implementation of adequate training programs, nor for the building of the lockup facilities. Therefore, the liability of the individual Defendants Yuska, Gribbin, Harvey, Gaigalas, Tucker, and Maeser turns upon the question of whether they were negligent or deliberately indifferent with respect to securing necessary medical care for the Decedent Plaintiff. To impose liability upon these individual officers, the Plaintiffs must prove that their actions imposed punishment upon the deceased during the period of his confinement, as well as upon factors relating to whether those officers with actual knowledge of the decedent's suicidal tendencies failed to take any action to protect him from himself. Further, the conduct of the individual officers must have been deliberate, and not merely negligent, for negligence has been conclusively determined by the Supreme Court of the United States to be an insufficient basis for an actionable claim under 42 U.S.C. Section 1983. At a minimum, therefore, the claims against the individual police officers for negligent conduct should properly be dismissed. As the Supreme Court in *Davidson v. Cannon*, 474 U.S. 344 (1986) held:

> "Respondent's lack of due care in this case led to serious injury, but that lack of due care simply does not approach the sort of abusive government conduct that the due process clause was designed to

> prevent . . . the guarantee of due process has never been understood to mean that the state must guarantee due process on the part of its officials."

The inescapable thrust of this plain ruling by the United States Supreme Court is that negligent conduct on the part of the individual police officers cannot form the basis for claims under Section 1983, whether those claims are presented under the Eighth Amendment or under the Fourteenth Amendment.

Of the individual police officer Defendants, only Officer Harvey and Corporal Gribbin had full knowledge of the particulars of the events of the evening in question. Both of these officers had read the suicide note, had spoken with the Decedent's relatives and had been involved in making the decision that he should be taken for an emergency evaluation. However, neither of these officers had any role in the decision to put the Decedent in the cell where he ultimatly took his life. It is undisputed that it was this action that afforded the Decedent the opportunity to commit suicide. It is likewise undisputed that Officer Gaigalas is the officer who placed the Decedent in the cell where he committed suicide and that Officer Gaigalas at that time had no knowledge of the Decedent's suicidal tendencies. (*See* Exhibit "A", portions of the Deposition Transcript of Officer Gaigalas, copies of which are attached hereto and incorporated herewith by reference). Officer Gaigalas has plainly stated, without contradiction, that had he known of the Decedent's suicidal tendencies, he would have never placed him in a cell where he could have committed suicide. It is also beyond dispute that Officer Gaigalas came on duty at approximately 6:15 a.m., at which time Mr. Buffington had already been arrested and was chained to a bar near the desk area. Absent some proof of actual knowledge on the part of Officer Gaigalas, there can be no liability against him for his actions with respect to the Decedent, which were, at worst, merely negligent.

Similarly, with respect to Officer Maeser, this officer was no longer on duty or even in the station house at the time Officer Gaigalas put Mr. Buffington into the holding cell. Officer Maeser's alleged wrongful conduct is framed in Paragraphs 21 and 46 to 51 of the Amended Complaint. All of these paragraphs, however, make specific reference to a period of time, beginning at approximately 6:25 a.m. when Officer Maeser was no longer in the station house. (See Deposition transcript pages — Exhibit "B" attached). Further, Officer Maeser is alleged to have violated certain duties owed to the Decedent, which duties would only arise if he were physically present and thereby in some way in control of the ultimate disposition of the Decedent. Further, to the extent that the Amended Complaint alleges a breach of these alleged duties on the part of Officer Maeser, these allegations allege merely negligent conduct on his part. Because this negligent conduct is not actionable, *Davidson v. Cannon, supra*, the Amended Complaint should be dismissed as against Officer Maeser.

Officer Ronald Tucker was the desk officer who relieved Officer Maeser and Officer Kamberger (Officer Kamberger is not joined as a Defendant in these proceedings), and he arrived on duty ahead of Officer Gaigalas. In his Deposition testimony, (*See* Exhibit "C", portions of the Deposition Transcript of Officer Tucker, copies of which are attached hereto and incorporated herewith by reference), Officer Tucker has stated that he became aware of the Decedent's suicidal tendencies, although he had not read the suicide note nor had much opportunity to observe the Decedent. The alleged wrongful conduct of Officer Tucker is framed in the same paragraphs as those addressing Officers Harvey, Gaigalas, Maeser, Sergeant Yuska, and Corporal Gribbin. However, at worst, the alleged wrongful conduct of Officer Tucker, as it related to his handling of the Decedent, was mere negligence and thus not actionable under Section 1983.

Sergeant Yuska was the oncoming shift supervisor at Wilkens Station on the morning in question and was the immediate supervisor of the other Defendants. Sergeant Yuska, in his Deposition testimony (*See* Exhibit "D", portions of the Deposition Transcript of Sergeant Yuska, copies of which are attached hereto and incorporated herewith by reference), has repeatedly stated that he had no knowledge of the Decedent's suicidal tendencies. Sergant Yuska has also plainly stated that he did not direct the desk officers to take any particular action with respect to the Decedent other than to state that here was a standing order on his part that suicidal subjects were not to be placed in the lockup. Further, Sergeant Yuska has likewise testified, without contradiction, that he was involved in a great many other routine duties during the period of time in which the Decedent was placed in the cell. Sergeant Yuska, therefore, had no knowledge of the Decedent's suicidal tendencies nor did he have any input with respect to place Mr. Buffington in a holding cell. Otherwise stated, there are no allegations, supported by competent evidence, that Sergeant Yuska was involved in any wrongful actions, negligent or otherwise, that directly and proximately caused the death of Mr. Buffington.

* * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Dec. 2, 1988]

Baltimore County, Maryland, et al., by their undersigned attorneys, moves this Honorable Court pursuant to Rule 50 of the Federal Rules of Civil Procedure for a directed verdict in favor of the Defendants as a matter of law, or, in the alternative, for a Judgment notwithstanding the verdict in favor of all of the Defendants and as grounds therefore state as follows:

1. That the within proceedings were tried before a jury, which trial ended on or about November 23, 1988 in a mistrial.

2. Prior to the case being submitted to the Jury, all of the Defendants made a motion for a directed verdict at the close of all of the evidence asking that the Court enter Judgment in their favor as a matter of law. At that time, the Court reserved its rulings on the Motions that were made, and no further ruling has been made on

said Motions subsequent to the conclusion of the trial as aforesaid.

3. Pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, the Defendants are now entitled to have the rulings previously reserved by this Court reviewed and adjudicated prior to a retrial of these proceedings.

4. The Defendants incorporate by reference the previous arguments presented at the time of trial in connection with the Motion for a Directed Verdict made at the close of all of the evidence. In addition, the Defendants incorporate herewith by reference the enclosed Memorandum of Points and Authorites submited in support of this Motion.

For the reasons stated, the Defendants respectfully request this Honorable Court grant directed verdicts in favor of all of the Defendants as a matter of law and that Judgments be entered in favor of the Defendants accordingly.

/s/ Arnold Jablon
ARNOLD JABLON
County Attorney

/s/ James G. Beach, III
JAMES G. BEACH, III
Assistant County Attorney

/s/ John A. Austin
JOHN A. AUSTIN
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Dec. 2, 1988]

* * * *

IV. *Individual Defendants—Federal Claims*

The claims against the individual Defendants are founded in negligence theories asserting claims under Section 1983. However, since the claims are merely for negligence, it is plain that these claims are not actionable. *See Daniels v. Williams*, 106 S.Ct. 662 (1986) and *Davidson v. Cannon*, 106 S.Ct. 668 (1986). Further, the evidence at trial in these proceedings fail to demonstrate more than mere negligence. At best, the testimony generated proof only of errors of judgments or an inadvertent failure to take appropriate action. Such conduct does not amount to "deliberate indifference." *See Boyce v. Aelizaduh*, 595 F.2d 948 (4th Cir., 1979). As the United States Court of Appeals for the Fifth Circuit held in defining deliberate indifference in *Johnson v. Treen*, 759 F.2d 1236 (5th Cir., 1985) :

> "The facts underlying a claim of 'deliberate indifference' must *clearly evince* the medical need in question and the alleged official dereliction. *Woodall v. Foti*, 648 F.2d 268 (5th Cir., 1981). The legal conclusion of 'deliberate indifference', therefore, must rest on facts clearly evincing 'wanton' actions on the part of the defendants." (Emphasis in original). 759 F.2d at 1238.

No proof was presented at trial evidencing that any of the conduct of any of the Defendants begins to approach the standard of recklessness or wanton conduct that is the basis of deliberate indifference. Further, as to the individual Defendants Behan and Kramer, the case can proceed against them only if they were deliberately indifferent in their respective roles as supervisors. As to Chief Behan, the record before this Court is totally devoid of any evidence that he was deliberately indifferent in connection with establishing appropriate training programs, in upgrading precinct lockups, and in continuing to establish and monitor Departmental Rules and Regulations relating to suicidal detainees. However, the failure to implement every conceivable device or practice or to implement every conceivable program of training to prevent suicides does not amount to the wanton conduct that is the standard for deliberate indifference. *See* for example, *Roberts v. City of Troy*, 773 F.2d 720 (6th Cir., 1985) (budget constraints and limited resources in personnel that resulted in failure to provide suicide prevention training does not amount to deliberate indifference). Moreover, there is no clearly established legal principle within this Circuit requiring that all possible precautions be taken in order to avoid liability under 42 U.S.C. Section 1983. The same is true with respect to Captain Kramer. Indeed, Captain Kramer was the Commander of the Wilkens Precinct for slightly over six (6) months prior to March 19, 1987. This period of time is plainly inadequate for Captain Kramer to have implemented the

kinds of suicide training postulated by the expert witnesses who testified on behalf of the Plaintiffs. Because there is no *respondeat superior* liability on behalf of either Chief Behan or Captain Kramer, and because there is no evidence that their conduct as supervisors was deliberately indifferent, the Federal claims should now properly be dismissed.

With respect to the individual officers, it is plain that Officer Maeser cannot be held deliberately indifferent regarding the handling of Mr. Buffington for he was no longer present when Mr. Buffington was placed in a detention cell. Likewise, with respect to Officer Harvey, Sergeant Gribbin, and Sergeant Yuska, none of these individuals was responsible for either commanding, directing or suggesting that James Buffington be placed in a detention cell. Not only is there no evidence of deliberate indifference on behalf of these four (4) officers, but there is likewise no causal connection between any of their conduct and the placing of Mr. Buffington in a detention cell. With respect to Officer Tucker, he likewise had no input into the decision to place Mr. Buffington into a detention cell, and there is no other evidence that he was otherwise deliberately indifferent to Mr. Buffington's serious medical needs. As to Officer Gaigalas, at best, the evidence adduced against him demonstrates merely errors in judgment or an inadvertent failure to take appropriate action. For these reasons, the Federal claims against the individual officers should be dismissed.

Each of the individual Defendants possesses a qualified immunity from liability under Section 1983, so long as their conduct is reasonable in light of legal rules and principles that were clearly established at the time of the actions in question. As the United States Court of Appeals for the Fourth Circuit held in the case of *Osabutey v. Welsh*, —— F.2d ——, No. 87-1757 (decided September 16, 1988):

> "The standard to be applied here is one of the 'objective legal reasonableness' of official conduct, 'assessed in light of the legal rules that were 'clearly established' at the time it was taken. *Anderson v. Creighton*, —— U.S. —— (1987), 55 U.S.L.W. 5092, 5093. It is the right that is alleged to have been violated that must be 'clearly established.' It must be sufficiently so '. . . that in light of preexisting law the unlawfulness must be apparent.' 55 U.S.L.W. at 5093."

Evaluating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date. Other cases establishing a different standard such as *Spell v. McDaniel*, *supra*, and *Cooper v. Dyke*, 814 F.2d 941 (4th Cir., 1987) were decided after March 19, 1987, the date of Mr. Buffington's death. Because police officers are not required to anticipate the future course of case law decisions and are only required to conform their conduct to clearly establish law, it is plain that the standard of deliberate indifference is the only standard that is properly applicable as a basis for evaluating the conduct of the officers with regard to the Federal claims presented in this litigation. A straightforward application of the requirement of deliberate indifference plainly requires a dismissal of the Federal claims against each of the individual Defendants.

For the reasons stated herein, the Defendants respectfully request this Honorable Court to rule upon the Motions for Directed Verdict and that these Motions be granted entering Judgments in favor of these Defendants as a matter of law.

* * * *

APPENDIX D

[973]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 9

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, Deceased and DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND,
CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10.00 a.m. on January 12th, 1989, at Baltimore, Maryland.

APPEARANCES

On behalf of the Plaintiffs:
William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:
John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1032] THE COURT: Let the record show that the plaintiff has rested their case.

Are there any motions?

MR. AUSTIN: Yes, Your Honor, thank you. At this time on behalf of each and every one of the defendants we would move for judgments in their favor, and we would initially, of course, move for judgments in favor of all of the individual defendants in their personal capacities, there being no testimony whatever that they acted other than in their official capacity as police officers.

Secondly, we would at this time submit for Your Honor's further consideration the points made in the motion for judgments NOV that is currently before the Court and has been reserved as well as the points and authorities and arguments prepared in the memorandum that accompanied that motion.

In addition, Your Honor, I would also like to make the following points in support of the motion. The first point is with respect to the civil rights claim under Section 1983. The [1033] standard must be proof of deliberate indifference of the various individual defendants involved, including Chief Behan, and deliberate indifference is synonymous with wanton neglect, with willful misconduct in regard to the serious medical needs of persons such as Mr. Buffington.

None of the expert witnesses in this case have identified any actions on the part of these officers that violate that standard. The expert witnesses talked about a lot of things, ACA standards, AMA standards, numbers of written commentaries, but none of them flatly stated that what the officers did was deliberately indifferent or in violation of any of the case law standards that have been handed down with respect to handling suicidal detainees. All they said was they did not follow some of these guidelines, some of which are merely suggestions for action, but in no place did I hear any of the expert witnesses say this conduct amounted to deliberate indifference or was even negligent.

But again, if the conduct was to be considered only merely negligence, that is not deliberate indifference and that did not give rise to any claims under Section 1983.

Further, with respect to Chief Behan, he must be considered to be indifferent in the manner in which he administers the department. The evidence does not show that. The only dispute can be is whether or not he may have done things differently or better, but it is clear he was doing some [1034] things, and to have deliberate indifference you must really have almost total inaction or action that is of little consequence, and there has been no testimony that what Chief Behan did was of no consequence or made little difference with respect to running the department, but rather only these experts had a difference of opinion as to whether or not he was doing enough; and that's not enough to go to the jury on the civil rights claim.

As to the negligence counts, under the state law claims, again we would reassert governmental immunity and public official immunity on behalf of these officers in Balitmore County. Again, if what has been proven is negligence they are immune. With respect to good faith immunity, I think it's clear that all of the officers have this and that the evidence indicated, to this point has indicated that they all acted in good faith with respect to trying to discharge their responsibilities in this regard.

With respect to Chief Behan, it's clear from his testimony or the testimony that the defendant elicited from him through deposition that he acted in good faith with respect to trying to administer to the defendant properly, and in trying to observe all the legal guidelines. I believe his deposition testimony was on point. He attempted to have the department monitor and observe all current trends in the law in that regard. I believe the evidence at this point, is that there is [1035] no dispute at this point as to his good faith administration of the department which removes him from liability under Section 1983.

Other than that, Your Honor, we would rest on the points made in our memorandum. Thank you.

* * * *

APPENDIX E

[973]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 9

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, Deceased and DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND,
CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10:00 a.m. on January 12th, 1989, at Baltimore, Maryland.

APPEARANCES

On behalf of the Plaintiffs:

William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:

John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1153] MR. GATELY: Motions, Your Honor?

THE COURT: All right.

MR. AUSTIN: What's your pleasure on motions? Can we argue them now or tomorrow morning.

THE COURT: What's your pleasure? I will be here tomorrow morning.

MR. AUSTIN: We just have to put it on the record and we can do either today or tomorrow.

THE COURT: We can get it down while you're talking about it.

MR. AUSTIN: Fine, thank you.

Your Honor, at this time I would move for judgment in favor of each and every one of the defendants and as to each and every one of the claims, and I would like to briefly summarize the arguments that I made previously and the arguments that we made in our motion for directed verdict and for motion notwithstanding the verdict, which motions Your Honor has currently reserved on at this time.

Your Honor, with respect to the federal claims, and I'll start with the federal claims, as against Baltimore County, Maryland, there must be a custom, policy, practice or usage causing the constitutional deprivation that must be proven. Again, the only custom, practice and usage that has [1154] been zeroed in on in this case has to do with policies, rules, regulations and training.

Now, in order for that training to be the proximate cause of the constitutional deprivation, the training must be so inadequate as to amount to no training at all. That is, there must be a policy of inadequate training, and inadequate training in the sense that the training is superficial or it's minimal, and I think there has been the evidence before the Court at this point on the situation of training is that while there may be disagreement among the expert witnesses as to what training is required or whether or not the department was doing enough. I think the testimony you have from the chief and

from Officer Hann is that a great deal of training is going on, perhaps not to the satisfaction of everyone but certainly training that has been approved by people knowledgeable in the field and it's given to all officers and is repeated.

And with respect to Baltimore County doing training, that is more than minimal. I think we clearly have a policy that this training has been furnished, the training is constitutionally adequate, and there is really no dispute for the jury to resolve with respect to whether or not it might have been better. It is above the constitutional threshold and therefore whether or not it might have been better is simply not an issue for the jury to resolve.

With respect to rules and regulations, the same thing [1155] is true, and again with respect to that you've heard a great deal of testimony about the CALEA standards and how they apply and cover this whole area.

In summary, Your Honor, as to Baltimore County, Maryland, there is no proof of a policy or custom or practice or usage that would bring them in under Section 1983, and we would ask for—again they are, except for proof of those elements, Baltimore County as a municipality has no liability.

As to the individual officers, I'll start with Chief Behan. Again, as to Chief Behan it must be shown that he was totally indifferent in his management of the department and in those areas that could have proximally caused the constitutional deprivation, and those areas would have to be training and supervision of the officers or rules and regulations. We have his testimony, which we believe there is no dispute from the other evidence in the case, that indicates that he was not deliberately indifferent, deliberately indifferent in the sense of being—again I'll quote from some of the cases. There must be wanton action, that is action indifferent or to be of so little consequence as to amount to no action at all; that is action in the face of a persistent need that simply does not address that need in any way. And we do not have the evidence of that with respect to Chief Behan.

Again, he also has good faith immunity as a public official. He acts in good faith to bring his conduct in [1156] compliance with accepted standards, and he is entitled to that good faith immunity. Again, his testimony was extensive as to what he has done to try to bring the department and the operations for which he is responsible into compliance with constitutional tandards.

Again, good faith applies in two ways: One, either you don't know of a constitutional requirement or act in good faith with respect to trying to otherwise conform to it, or you know of a constitutional requirement and make good faith efforts to bring your conduct in compliance with it. It is the second part that applies to Chief Behan. He was aware of what was required and he took actions in good faith to address those problems, and we don't feel there is a jury issue on that point either. And his testimony as to what he has done over the years is not really controverted by any of the other evidence.

As to the individual officers, with respect to Captain Kramer, there is no finding of superior liability on his part. As a commander there is no indication he did anything else that would subject him to liability under Section 1983. Particularly with respect to training, there was no specific responsibility for it on his part to do the training. The training was done by other people; therefore, he could not have been significantly indifferent with respect to the training programs.

There is no other indication that he was significantly [1157] indifferent. He of course was not present, had no part in it, and there is simply no evidence that would tie him in to the basic constitutional claims that the suicide death of Mr. Buffington was proximally caused by deliberate indifference to serious medical needs by any actions of Captain Kramer.

With respect to the other individual officers, I start with Officer Maeser. Again, Mr. Kirkland testified that Officer Maeser's conduct would be entirely correct if he

communicated the information on Mr. Buffington to the other officers. Officer Maeser testified exactly that. His testimony was supported by the other officers. Again, Officer Maeser was not there when Mr. Buffington was placed in the cell. There simply is no evidence to indicate that he, one, had knowledge of the serious medical needs or, two, was in a position to be significantly indifferent to it, having been relieved at the point in time in which action was required to have been taken.

Again, deliberate indifference contemplates either taking no action or taking perhaps inappropriate or inadequate or insufficient action in response to a serious medical need. That contemplates not only knowledge of that action but an opportunity to do something, and if Officer Maeser was no longer there, he no longer had an opportunity to do anything. He could not be deliberately indifferent.

Certainly with respect to Sergeant Yuska, again, a [1158] person would have to know and have an opportunity to act on the circumstances. Sergeant Yuska had an opportunity to act but he had no knowledge of the particulars of the suicide and again could not be deliberately indifferent for not acting upon that which he did not know.

With respect to Officer Tucker, the same situation. He was at the desk and was in a position to act, had some limited knowledge, but again relied upon what Officer Gaigalas did and was entitled to rely upon that.

With respect to Officer Harvey, he had knowledge but was not in a position to act as he was not aware where the prisoner was at the time the decision was made to put him in the lockup.

The same is true with Sergeant Gribbin. He had knowledge but did not have the opportunity or control over the prisoner at the time. As to both of these officers, they had in fact acted in good faith with respect to setting in motion the necessary events to secure that medical attention for him. They had begun an emer-

gency evaluation and they were seeing to it. Again, that therefore brings in their good faith immunity. They knew what the standard was, they were acting in furtherance of that in an effort to secure the necessary medical need, medical needs, and secure attention to the medical needs, and unfortunately the prisoner committed suicide before that could be realized.

[1159] Again with respect to Officer Gaigalas, he testified that he knew of the emergency evaluation but not that the gentleman was suicidal. There is a lack of knowledge in his circumstances, and again there are testimony at best generally not deliberate indifference but only proof of errors in judgment or inadvertence and at best negligence, and negligence has never amounted to deliberate indifference. In fact, the Supreme Court held that negligence is not actionable under Section 1983; and again the leading cases on that are Daniels vs. Williams Davidson versus Cannon. Again, in one of those cases a correctional officer was sued because he had not passed along a note that contained threats, and the Court held that that failure to pass along was inadvertence. He was negligent but was not culpable under Section 1983.

As to all of these that same standard should apply with respect to 1983.

As to all the officers in their individual capacity as opposed to their official capacity, there is no evidence there and the judgment should be entered in their personal capacities as to each and every one of them. They were taking actions only as police officers and not personally with respect to the events that lead up to the death of James Buffington.

As to the state law claims, again we have immunity. As to Baltimore County, Maryland, the operation of a police department is a governmental function and in governmental [1160] versus proprietary the only issues that are involved there, and again operating the police department has held to be governmental, the only question is one of waiver and we have addressed that in our

memo; and clearly the case law both from the Court of Appeals of Maryland as well as from the 4th Circuit indicates that there has to be a specific waiver of governmental immunity, that it cannot be implied from the existence of a program of self-insurance.

With respect to the individual defendants they all have public official immunity and that immunity applies to nonmalicious acts performed within the scope of their authority. No question that they were undertaking acts in the scope of their authority, and the best that has been proven is that there was negligence with respect to their handling of this prisoner. There is no proof of malice. Malice must be proven to be actual malice, that is an act done without legal justification or excuse, an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff. There is no evidence of that at all.

Again, the very best that there can be is some evidence of negligence. Negligence is not actionable. Public official immunity specifically prohibits any actions on negligence in situations in which you have police officers exercising the police powers of the state. We have exactly that here. With respect to the state claims, all these [1161] officers have pubic official immunity that now requires, there being no proof of actual malice, that judgment be entered in their favor as to the state counts as well.

For all these reasons, Your Honor, we would ask that you take this case away from the jury. The various immunities no longer require there to be anything for the jury to adjudicate with respect to the liability of these officers, and we ask the judgments be entered in their favor. Thank you.

* * * *

APPENDIX F

[1175]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 10

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, DECEASED

and

DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND, CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10:00 a.m. on January 17th, 1989, at Baltimore Maryland.

APPEARANCES

On behalf of the Plaintiffs:

William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:

John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1183] The plaintiffs' claims arise out of a suicide committed by their son James at the Wilkens Precinct prisoner lockup in the early morning hours of March the 19th, 1987.

Plaintiffs' claim can be broken down into two parts. The first part consists of constitutional claims and the second consists of state law claims for negligence.

Now, the first part of this case involves the constitutional rights of pretrial detainees. By detainees I mean persons in police custody who have not been tried or convicted of any crime. These constitutional rights of detainees place clearly defined constitutional duties on individual police officers, police chiefs, and municipalities such as counties.

In this case the plaintiffs claim that James Buffington's constitutional rights as a pretrial detainee were violated and that the defendants failed to comply with their duties under the constitution.

James Buffington was a detainee at the Wilkens Precinct on March 19th, 1987, and was in protective custody awaiting transfer to the hospital for an emergency psychiatric evaluation.

The constitution requires that police officers protect the safety of persons within their custody, and in the instructions that will follow I will inform you as to the [1184] precise nature of this duty.

Police officers have a specific constitutional duty to provide needed medical care to the persons within their custody. The constitution requires that medical care be given for psychological and psychiatric ills as well as physical ills. The constitution is violated by deliberate indifference to a serious medical need of a detainee.

The term deliberate indifference as used throughout these instructions has a precise constitutional meaning. Deliberate indifference exists when the conduct of any defendant gives rise to a strong likelihood, rather than mere possibility, that such conduct would result in harm to the detainee.

The plaintiffs need not prove that the conduct of the defendants was expressly intended or designed by them to cause harm to the detainee Buffington. It is only necessary that the plaintiffs prove that under the existing circumstances the defendants' conduct created a strong likelihood of harm to James Buffington.

If your ordinary understanding of the term or words deliberate indifference differs from the definition that I have just given you, you must disregard your usual understanding. As jurors you must apply the constitutional definition of deliberate indifference.

As a part of the constitutional duty to provide [1185] medical care, the constitution requires that police officers protect a detainee from committing suicide if they are aware that the person in their custody is suicidal and needs emergency psychiatric treatment. The failure to do so can amount to deliberate indifference in the constitutional sense.

Now, on the other hand, you are instructed that those who confine a detainee cannot be placed into a position of guaranteeing that a detainee will not commit suicide if they have no knowledge that he is suicidal.

You must consider the liability, if any, of each of the defendants separately and independently.

As to the constitutional claims, in order for you to return a verdict in favor of the plaintiffs and against the defendants Harvey, Gribbin, Yuska, Maeser, Tucker and Gaigalas, the plaintiffs must prove the following facts:

One, that these officers knew or should have known that James Buffington was suicidal;

Two, that their conduct in placing or permitting Buffington to be placed in a cell by himself created a strong likelihood that James Buffington would commit suicide while locked in the female cell;

And, three, that their conduct proximately caused the suicide.

* * * *

[1199] THE COURT: Mr. Austin.

MR. AUSTIN: Thank you, Your Honor. Your Honor, our first exception would be the Court's failure to give a good faith instruction under the federal claims, that is the federal good faith immunity, and again in that regard we would proffer to the Court our proposed instructions number 1, 2 or 3 is an appropriate definition or the definition given by the Court of Appeals in the footnote in Cooper versus Dyke, D-Y-K-E, 814 F.2d 941, an instruction given by Judge Harvey approved by the Court on that occasion. Under the federal claims federal instructions, Your Honor, the proximate cause instruction Your Honor gave was more of a reasonably foreseeable instruction rather than a proximate cause instruction.

THE COURT: I gave it twice.

MR. AUSTIN: Once for the state or federal claims. To avoid confusion there is a different standard for these claims. I ask the Court to give an additional instruction on proximate cause to instruct the jury proximate cause is proximate cause. There is no distinction. Again I think the instruction you gave, at that point in the instruction I think you were talking about the federal claims, did not go far enough in that regard.

THE COURT: Let me simply interject here. We have met three times to go over these instructions. I note that at [1200] least one of those times you weren't present. We gave counsel an opportunity to make any objections or corrections or change in language. I think that's a fair statement, isn't it?

MR. WHITNEY: Yes, it is, Your Honor.

MR. AUSTIN: .Yes, Your Honor. On one of those occasions I suggested the instruction from Cooper v Dyke the Court approved in footnote number 3, and we would again urge it to be given.

Your Honor, with respect to the instruction on deliberate indifference, Your Honor's instruction we feel does not go far enough. We would ask—there is nothing wrong with it as it's given, but we would ask the Court

to instruct the jury along the lines of the Cooper v Dyke instruction or the instruction—

THE COURT: When did you give that to the Court?

MR. AUSTIN: On Friday after the conference with Mr. Cook. I referred Your Honor's law clerk to the language in Molten versus City of Cleveland, 839 F.2d 240 at 243 and the statement of the Court in Matjer v Leis, 571 Fed.Supp. 918. We would ask that those instructions be given because of the language there, those cases being jail suicide cases that we feel is a necessary supplement to instructions that are already given.

Your Honor, with respect to the instruction that you gave that, I'm relying on memory but it was something to the [1201] effect that the police officers have a duty to protect an inmate from committing suicide, we would object to that instruction as not being law. The law is the officers have a duty to give medical care and not be deliberately indifferent to medical needs. There is no constitutional standard requiring inmates to be protected from committing suicide.

With respect to Your Honor's instruction about protecting an inmate, that protection instruction is not supported by the facts of this case. There was no evidence this inmate needed protection from anything else, that is other persons. Protection from other than committing suicide, which we have already argued is not the law, it's not the standard. The deliberate indifference standard is the standard. To go beyond that is to give the jury an additional reason for deciding against the officers.

Your Honor, with respect to the Court's definitions concerning Captain Kramer and Chief Behan, Your Honor has instructed the jury that the custom and policy must be unconstitutional, but I think what Your Honor should additionally tell the jury is custom and policy must be not only unconstitutional but the custom and policy must proximately cause the injuries complained of. I don't think that was highlighted sufficiently in the same context so the jury can tie it together.

Again I would object to Your Honor's instruction that [1202] any customs or policies known to Captain Kramer are a basis for imposing liability on Baltimore County. That is an error based on the facts of this case, which the testimony is clear Chief Behan alone makes policy for Baltimore County. He's the only policy maker, that is a defendant in this case. Captain Kramer, is not a policy maker and so therefore any actions or inactions on his part cannot be attributed to Baltimore County as making policy because he's not a policy maker. We would ask that the Court strike that part of the instruction because the facts do not support that instruction in this case.

Your Honor also gave an instruction on the missing evidence instruction, that we would ask the Court to strike because there is no missing evidence, there is no evidence that has not been produced.

THE COURT: I didn't say anything about missing.

MR. AUSTIN: I'm using that as a generic term. I don't think there was any testimony that any evidence was missing or suppressed or destroyed, so I don't feel it's supported by the facts of this case.

THE COURT: All right.

MR. AUSTIN: With respect to the instructions on Chief Behan and Captain Kramer about a policy of inadequate monitoring or supervision of detainees, we believe that instruction to be erroneous and invites a respondeat superior verdict against the chief and Captain Kramer or against [1203] Baltimore County.

There is no evidence of inadequate monitoring or supervision of detainees. We would object to that being given. It invites a verdict based upon a policy that has not been proven. The only policy that has been attributed to anyone was a policy that was facially constitutional, the Yuska/Perpura policy. That policy was facially constitutional and could not have caused any constitutional violations.

Your Honor, with respect to the Court's instructions under the federal courts with respect to punitive damages, again you have identified reckless and callous indifference

to constitutional rights of the plaintiff and equated that with the standard to overcome deliberate indifference, and we feel that is incorrect, that the standard for punitive damages should be actual malice.

Your Honor, with respect to the state instructions, we would object to the Court's refusal to give the instruction on public official immunity. We feel it is raised in the case. It has been raised throughout the case and is part of this case and the jury should be instructed on it. It's an affirmative defense and I object to Your Honor's failure to giving an instruction on it.

With respect to the actual malice instruction required for an award of punitive damages under state law, we feel that same instruction should be given with respect to [1204] federal law, with the exception that there should be no instruction on implied malice. The standard is one of actual malice and implied malice is not the law. Implied malice appears in constructive fraud cases, slander and deceit cases, but not a case like this.

Finally, with respect to the negligence counts as such the jury should be instructed and the sheets should be revised to show no punitive damages should be awarded for negligence to anyone. You only instructed the jury that the estate can recover punitive damages and not Mr. and Mrs. Buffington as state law plaintiffs. As to that point, Your Honor, we would strongly object to there being any allowance of punitive damages in favor of any party as to the state law counts.

We would cite for Your Honor's reference Medina versus Meilhammer, 62 Md.App. 239, in which the Court reversed the judgment entered for punitive damages with respect to a negligence action and it did so in language that says that what is required as a legal equivalent of malice is conduct of an extraordinary outrageous nature. There is no evidence of that kind of conduct in this case and therefore punitive damages as a claim should not go to the jury.

Finally, Your Honor, with respect to Your Honor's instruction concerning state law claims and the instruc-

tion of Baltimore County can be found liable under what I will term a [1205] respondent superior instruction should not have been given in Baltimore County, it should be dismissed. That's the state law claims. There is no basis for that instruction because as a matter of law they should not be in the case.

Again as to that point also, if Your Honor were to give the public official immunity instruction, the jury would have before them a necessary finding the individual officers are immune by virtue of their public official immunity, then Baltimore County is also immune because the principal cannot be liable to the agent if he's not liable.

Finally, Your Honor, we would ask the Court at this time to dismiss Mr. Maeser, Officer Maeser, as a defendant based upon the concession made in closing argument by Mr. Gately that really there was no evidence against him. There is no point sending this case to the jury and keeping Officer Maeser on the hook as to this case. In view of that there simply is nothing for the jury to decide. We would ask that Officer Maeser be dismissed, the verdict sheet be amended so as to strike his name out, Your Honor, enter a judgment in his favor at this time as a matter of law, instruct the jury not to consider his liability at all.

THE COURT: Don't say finally again.

MR. AUSTIN: That would be all I have, Your Honor.

THE COURT: Let me just ask, when this case goes up counsel recognize and include in their brief the fact we had a [1206] first meeting on instructions and you weren't there, the second meeting I believe on instructions you weren't there, and at each of these conferences we went over these instructions word by word and I made those changes that I thought reflected the discussion of everyone. I just think the Court above should know what took place. It's hard to keep up with one who makes objections and corrections are made, then another person comes in.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Jan. 27, 1990]

Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas, Defendants, by their undersigned attorneys, move this Honorable Court pursuant to Rule 50 of the Federal Rules of Civil Procedure for a directed verdict in favor as a matter of law, or, in the alternative, for the entry of a Judgment notwithstanding the verdict and as grounds therefore state as follows:

1. That the within proceedings were tried before a jury, which Jury returned a verdict on or about January 19, 1989, as reflected in the attached Verdict Sheet, a copy of which is attached hereto and prayed to be made a part hereof and is marked Exhibit "A".

2. Prior to the case being submitted to the Jury, all of the Defendants moved for a directed verdict in their favor at the close of all of the evidence asking that the

Court enter Judgment in their favor as a matter of law. At that time, this Court reserved its ruling on that Motion and no further ruling has been made on said Motion subsequent to the conclusion of the trial as aforesaid.

3. That prior to the commencement of the aforesaid trial, an earlier Motion for a Directed Verdict or for Judgment Notwithstanding the Verdict was filed on behalf of these same Defendants on or about December 2, 1988. Said Motion has not been ruled upon at this time, as the Court has reserved its rulings until after the Jury has returned its verdict.

4. That because of the verdicts returned by the Jury, the Motions are moot with respect to certain of the Defendants, namely, the Defendants Corporal (now Sergeant) Joseph Gribbin, Officer L. S. Harvey, Sergeant Daniel Yuska, Officer William L. Maeser, and Captain Kenneth W. Kramer. Pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, the Defendants, Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas, are now entitled to have the rulings previously reserved by this Court reviewed and adjudicated as a matter of law at this time.

5. That as a matter of law, there is no Federal survivorship action as alleged in Count II of the Amended Complaint, and therefore, the verdicts rendered under the Federal claims in favor of the Plaintiffs should now properly be stricken as a matter of law.

6. That the verdicts that were returned in favor of the Personal Representative of the Estate of James Buffington for the conscious pain and suffering suffered by the Plaintiff's Decedent should properly be stricken as there was no evidence presented before the Jury that the Plaintiff's Decedent suffered any conscious pain and suffering in the moments prior to his death. Accordingly, the verdict rendered on these claims by the Jury should properly be stricken as a matter of law.

7. That the Defendants because of the immunities available to them, particularly including, qualified good faith immunity with respect to the Federal Claims, are entitled to have this Court enter Judgment in their favor as a matter of law.

8. These Defendants incorporate by reference the previous arguments presented during the aforesaid trials in connection with the Motions for Directed Verdict made at the close of all of the evidence. In addition, the Defendants incorporate herewith by reference the attached Memorandum of Points and Authorities submitted in support of this Motion.

For the reasons stated, the Defendants, Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas respectfully request this Honorable Court enter directed verdicts in their favor as a matter of law and that Judgments be entered on these verdicts in their favor, assessing costs against the Plaintiffs as appropriate.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

IV. *Individual Defendants—Federal Claims*

The Jury returned verdicts under 42 U.S.C. Section 1983 against Chief Behan and Officers Turcker and Gaigalas. As has been noted previously, these verdicts are inherently inconsistent with the verdicts the Jury also returned under the negligence counts against these same individuals. The Plaintiffs were required to prove that each of the individual Defendants Behan, Tucker and Gaigalas were deliberately indifferent in their handling of Mr. James Buffington, specifically they were required to prove facts that "clearly evince the medical need in question and the alleged official dereliction, namely, 'wanton actions' on the part of the Defendants." *See Johnson v. Treen*, 759 F.2d 1236 (5th Cir., 1985). As to Chief Behan, if he was merely negligent in his management of the Police Department, then Judgment should be entered in his favor as there is no respondeat superior liability on his part as Chief of Police for the wrongful acts of subordinates. *See Spell v. McDaniel, supra.* No proof was presented at trial evidencing any conduct on the part

of Chief Behan that demonstrated that he managed the Department recklessly or with wanton disregard for proper police standards. At best, the testimony from the Plaintiffs' experts was to the effect that the Chief had failed perhaps to implement every conceivable management practice or program of training to prevent suicides. However, such failures do not amount to wanton conduct that was required to prove deliberate indifference. *See Roberts v. City of Troy*, 773 F.2d 720 (6th Cir., 1985). Moreover, there is no case law requirement within this Circuit that imposes upon police managers the requirement that all possible precautions be taken in order to avoid liability under 42 U.S.C. Section 1983. Indeed, even to sustain a verdict for negligence against Chief Behan, it will be necessary for there to be testimony establishing the appropriate standard of care. As noted previously, there was no such testimony presented during the trial of this case. Assuming, arguendo, that the standard of care had been established, no evidence was adduced that Chief Behan's conduct was more than merely negligent with respect to his management of the Police Department. Accordingly, the verdict against Chief Behan should properly be stricken, and the Federal claims against him dismissed as a matter of law.

With respect to Officer Tucker, there was simply no causal connection between any conduct on his part and the placing of Mr. Buffington in a detention cell. It was undisputed that Officer Tucker had no input into the decision to place Mr. James Buffington into a detention cell, as he did not speak with either Officer Harvey or Officer Gaigalas prior to Officer Gaigalas placing Mr. Buffington in a cell. However, Officer Tucker did not command, direct or even assist Officer Gaigalas in placing Mr. Buffington into a detention cell, nor did he have any other contact with him that would have put him on notice that Mr. Buffington was so overtly suicidal that he was required to be detained at the bar in the desk area. The testimony is clear that only Officer Gaigalas

had this information and that Officer Gaigalas did not communicate this to Officer Tucker. Accordingly, the Jury's verdict against Officer Tucker cannot be sustained for there is no evidence that *any* conduct of his proximately caused the death of Mr. Buffington. Further, there is no evidence that Officer Tucker was deliberately indifferent to Mr. Buffington's serious medical needs, or that he even had actual knowledge of the nature and extent of Mr. Buffington's medical needs. As has been repeatedly argued throughout these proceedings, proof of deliberate indifferent requires evidence which clearly demonstrates knowledge of the medical need in question and conduct with respect to the prisoner and the known medical need that wantonly or recklessly disregarded the seriousness of the medical need. *See Sosebee v. Murphy*, 797 F.2d 197 (4th Cir., 1986). As to Officer Tucker, there is no evidence that he had knowledge of the full nature and extent of Mr. Buffington's emotional deterioration sufficient to require him to intervene and overrule Officer Gaigalas' handling of the situation. In short, there was no conduct on his part that was deliberately indifferent to a known serious medical need of Mr. Buffington. There was, therefore, no basis upon which the Jury could return a verdict against him, and thus, the same verdict should now properly be stricken and Judgment entered in favor of Officer Tucker.

With respect to Officer Gaigalas, at best, the evidence adduced against him demonstrates mere errors in judgment on his part or an inadvertent failure to take appropriate action by maintaining Mr. Buffington at the bar. There was no evidence of wanton or reckless conduct on the part of Officer Gaigalas, and the Jury's verdict rejecting the Plaintiffs' claims for punitive damages is evidence that the Jury felt that no wanton or reckless conduct had been proven. Indeed, the Court's instructions on this point were to the effect that the standard for finding deliberate indifference was the same standard required for awarding punitive damages. If it is assumed

that the Jury faithfully followed these instructions, then their verdict denying punitive damages of necessity required a factual finding that Officer Gaigalas was not wanton or reckless in his handling of Mr. Buffington. Because the standard of deliberate indifference and for punitive damages are the same, the Jury's verdict against Officer Gaigalas must have plainly rested upon findings by them that he was merely negligent in his conduct with respect to the safety of Mr. James Buffington. For all of these reasons, the verdicts against Officer Gaigalas should now properly be stricken, and Judgments entered in his favor as a matter of law.

* * * *

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1161 (L)
CONS. W/89-1021, 1040, 1054 and 1055

BARBARA BUFFINGTON, *et al.*,
Appellees,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1161 (L), 89-1021,
89-1040, 89-1054

BARBARA BUFFINGTON, *et al.*,
Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants-Appellants

APPELLANTS' BRIEF

THE STATEMENT OF ISSUES

1. Is there a right which exists pursuant to the Fourteenth Federal Constitution which guarantees an individual, in the police custody as a result of a request for assistance from the family, protection by the State from suicide?

2. If no such right exists, are the individual Appellants immune from liability?

* * * *

ARGUMENT

I. THERE IS NO RIGHT WHICH EXISTS, PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH REQUIRES THE STATE TO PROTECT FROM SUICIDE THE INDIVIDUAL WHO COMES INTO CUSTODY OF THE STATE AS A RESULT OF A REQUEST FOR EMERGENCY ASSISTANCE FROM THE FAMILY.

The Due Process Clause of the federal constitution imposes upon the State [11] no duty that the State protect an individual from suicide, when that person has come into the custody of State agents as a result of a request for emergency assistance by the family. The Due Process Clause, by its own terms, is a restraint [12] against the government's exercise of power, against its citizens, in either an arbitrary or oppressive manner. That Clause of the Constitution is "not . . . a guarantee of certain minimal levels of safety and security. It forbids the State . . . to deprive individuals of life, liberty, or property, without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ——, 109 S. Ct. ——, 103 L.Ed.2d 249 at 258-59 (1989) (holding that the Department was under no obligation to protect a child from violence of the custodial parent, where the social workers knew of the father's violent propensities).

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[11] For purposes of actions initiated under Title 42 U.S.C. Section 1983, "State" includes local governments and municipalities. *Monell v. Department of Social Services*, 436 U.S. 659, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

[12] "[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law. . . ."

Here, the record is clear that James Buffington came into the custody of Baltimore County police officers upon the receipt of a request for emergency assistance by James' brother and sister-in-law (Apx. 1068-1103; 1104-23; 1124-1201). Police began to prepare the paperwork associated with the incident, including a petition for an emergency psychiatric evaluation at a local hospital (Apx. 1124-1201). It is undisputed that suicide was the cause of death.[13] It would therefore be anomalous, following *DeShaney v. Winnebago County*, *supra*, to hold the State accountable for the suicide, when the Due Process Clause affords no relief against the State for injuries which result from the violence of a third person.

This construction of the Due Process Clause is entirely faithful to the framers' intent and is consistent with jurisprudence of the Supreme Court that, in other contexts, has held that the limitations imposed upon the government through the Eighth and Fourteenth Amendments created a guaranty to individuals in police custody of reasonable medical care and treatment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976) (Eighth Amendment protection against cruel and unusual punishment requires provision of medical care to prisoners); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L.Ed.2d 605 (1983) (Due Process Clause of the Fourteenth Amendment requires responsible governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by police).[14] The philosophy which underpins either line of this authority is that the State's deprivation of the individual's liberty

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[13] *Compare, e.g., Spell v. McDaniel*, 824 F.2d 1380 (1987), where the cause of injury was overt acts of police brutality.

[14] There is also a substantial corpus of law among the federal circuit and district courts which has recognized the prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment. *See, e.g., Patridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986).

renders the individual unable to attend to his own medical needs. Accordingly, it is necessary for the State to provide such care for the person. Otherwise, a failure to provide the required medical care would constitute an abuse of power, through the State's inaction, proscribed by the limitations of the Eighth Amendment's "cruel and unusual punishment" clause and the Due Process Clause of the Fourteenth Amendment *DeShaney*, *id.*, 103 L.Ed.2d at 262. Moreover, the State's deprivation of the liberty of either the convict or the apprehended detainee vindicates peculiar State interests: punishment of the convict or detention of the apprehended detainee, incident to the process of the criminal law. Thus, the State's exercise of power, through the criminal law, modifies the status of the person, permissibly, to that of either a convict or a pre-trial detainee, but only to the extent of the protections afforded the person by the Eighth and Fourteenth Amendments. One must, however, read either line of authority in the context of the State's motive which occasioned the deprivation of individual liberty. In one case, the State takes from the individual his liberty as a punishment. In the other, the State deprives the individual of liberty in order to subject that person to the criminal law and potential punishment. Neither case, however, addresses the question of what, if any, right(s) the Fourteenth Amendment creates in favor of a suicidal individual whom the police take into custody, in answer to a distress call from the family, in an effort to *give* assistance and psychiatric care, in contrast to the situation where the State either takes or retains custody over an individual for the purpose of subjecting the person either to punishment or the criminal process.[15]

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[15] The "game plan," according to the testimony of Officer Lewis Harvey, was to seek an emergency psychiatric evaluation at the Greater Baltimore Medical Center, upon application of a petition (Apx. 1137). The petition process is established pursuant to MD. HEALTH-GEN'L CODE ANN. (1982 Repl. Vol), Title 10, Section 10-

II. IF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CREATE A DUTY UPON THE STATE TO PROTECT THE INDIVIDUAL FROM SUICIDE, THEN THE INDIVIDUAL APPELLANTS ARE ENTITLED TO ASSERT AND PREVAIL UPON THE DEFENSE OF QUALIFIED IMMUNITY.

Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist; *see Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton*, —— U.S. ——, 107 S. Ct. 3034, 9 L.Ed.2d 523 (1988). Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

620, Part IV, "Emergency Evaluations." Part IV is one of five parts of Subtitle 6, Title 10, which, in turn, is a statutory scheme covering various types of admissions, e.g., voluntary, involuntary, etc. The Statement of Charges Harvey contemplated completing was suggested to the family, and agreed upon after consulting with counsel, as a means of maintaining control ovr Buffington if the hospital rejected the emergency petition (Apx. 1150; 1081-85). The "fall back" position was that police would retain control over Buffington until the family was able to procure a commitment (Apx. 1082).

III. ASSUMING THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GIVES RISE TO A DUTY UPON THE STATE TO PROVIDE PROTECTION FROM SUICIDE, THE EVIDENCE ESTABLISHES THAT THE PROXIMATE CAUSE OF THE SUICIDE WAS THE ACTION OF THE INDIVIDUAL DESK OFFICER ALONE, AS OPPOSED TO ANY IDENTIFIED DEFICIENCY IN THE COUNTY'S POLICE TRAINING.

* * * *

Here, the proximate cause of suicide, leaving aside the question of whether the incident was the result of a voluntary, deliberate choice by the decedent, was the act of Appellant Gaigalas of placing decedent in a cell, unobserved and alone. Gaigalas' act was done with knowledge of decedent's condition (Apx. 1407-08). Despite the fact that Gaigalas knew of other similar occurrences and should have appreciated the consequences that might result (Apx. 1402-05), Gaigalas still placed decedent into the cell. Finally, Gaigalas ignored the standing orders of his shift officer that a potential suicide was to remain handcuffed to the bar, under constant observation, at all times (Apx. 1405). Assuming, for argument's sake, that there existed a lack of in-service training occasioned by the deliberate indifference of a corporate policy maker, such deficiency was not the "moving force" behind the incident. "Adequate" training would only have supplied information that every police officer, summonsed by Appellees to testify, already knew: suicidal persons should be kept under constant observation at all times and not isolated. Gaigalas knew this without having had the benefit of such training. Section 1983 affords one relief from the exercise of poor judgment, the failure to follow orders, or blatant stupidity. As the District Court described the situation, "it was [un]necessary for the police to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated cell with his pants

on. A semi-clear head and a normal degree of common sense would have sufficed" (Apx. 964-65). If common sense and/or a semi-clear head is all that is required, training is irrelevant. Thorough training does not mean that the trainee is going to use it. Gaigalas' ill-conceived actions, and those alone, are the proximate cause of the incident. Accordingly, the Court erred in submitting the case to the jury and this Court must reverse the judgments entered against Appellants.

* * * *

VI. THE DISTRICT COURT COMMITED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY.

Reversal of judgment may be appropriate when the lower court erroneously instructs the jury regarding the applicable law. The Court instructed the jury upon the duties and responsibilities of Tucker and Gaigalas, the individual desk officers (Apr. 2243-46), Baltimore County (Apx. 2246-49), Chief Behan and Captain Kramer (Apx. 2249-50). The Court also instructed the jury regarding the rights of suicidal persons in the custody of police (Apx. 2244-45).[52] The Court appears to have instructed the jury under the "policy" prong and the custom prong (Apx. 2247-48).

The Appellees' claim appears to revolve around the contention of inadequate training and/or supervision. Local governments may be held accountable for *municipal* acts or policies, or for the decisions or policies of those who may be said to act in behalf of the government: policymakers. *Monell v. New York City D.S.S.*, 436 U.S. 6581, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978); *City of Canton v. Harris*, 489 U.S. ——, 109 S. Ct. ——, 103 L.Ed.2d 412 at 424 (1989). A single incident, based upon a facially unconstitutional policy may result in Section 1983

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[25] For the reasons stated previously, these instructions as to the rights of detainees were erroneous.

liability, *Monell v. New York City D.S.S.*, *id. City of Canton v. Harris*, *id.*, considered the question of whether municipal liability would result from "a concededly valid policy . . . unconstitutionally applied by a municipal employee" if the injury results directly from the municipality's inadequate training (103 L.Ed.2d at 425. The Supreme Court concluded that, in such a case, a cause of action would exist only where the failure to train amounted to deliberate indifference to the rights of persons with whom police come into contact, and the failure to train was the moving force behind the violation, *Canton*, *id.*, at 426-28. It would seem that the "failure to train" must itself represent municipal policy, i.e., a "deliberate choice to follow a course of action . . . made from various alternatives. . . ." *Canton*, *id.*, at 427. It would also appear that the policymaker's mental state is directly in question: The failure to train must be the "conscious" choice. *Canton*, *id.*, at 427. The failure to train must evidence "deliberate indifference." *Canton*, *id.*, at 427.

There would seem to be some deficiencies in the Court's instructions. First, with respect to the County under the policy prong (Apx. 2246), the Court instructed that in order for the plaintiffs to prevail, the law required them to "prove that the failure to prevent the suicide . . . resulted from an unconstitutional policy of Chief Behan. . . ." There would seem to be no evidence to support this instruction. First, the only policy made by Behan that would attach liability to the County was the CALEA standard, which would appear to be constitutional (Apx. 2162-67; 2380; 1593-1600); generally, 1575-1592; 1600-1604). Thus, reversal may be required because of lack of evidence as to the unconstitutionality of the CALEA standard. However, assuming for argument's sake that the claim may nevertheless sound as one of unconstitutional application, by virtue of inadequate training, of a facially constitutional policy, other problems seem to exist. The instruction fails to define "policy." The jury is not required to find that the "lack of training" was a

"deliberate" or "conscious" choice made among alternatives.[26] Moreover, the instruction permits the jury to assign liability to the County for Behan's "failing to provide constitutionally[27] adequate training. . . ." *Canton* seems to require that the failure to train properly must be the "moving force" that caused the violation and, evidently, the *only* cause. Finally, there is no requirement that the jury find that the failure to train, by Behan, was "deliberately indifferent." Thus, the jury is free to assign liability to the County merely by virtue of Behan's failure to train. Respectfully, *Canton* seems to require more. *Id.* at 426-27.[28, 29] This Court must reverse because the instructions permit the jury to attach liability to the County upon an overbroad standard.

The Court also instructed the jury that it could consider "a failure to conduct thorough investigations into prior episodes of police misconduct may be considered as evidence of the policy of nonsupervision of police offers

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[26] Contrast the CALEA policy: Presumably, the Chief could have selected the AMA, ACA, or NCS standard.

[27] The instructions do not seem to define when training is considered "constitutionally adequate."

[28] "Monell's rule that a city is not liable under Section 1983 unless a municipal policy causes a violation will not be satisfied by merely alleging that the existing program . . . represents a policy for which the city is responsible . . . if [the training] is [not] adequate . . . the question becomes whether such inadequate training can justifiably be said to represent 'city policy,'"

which in turn implicates the policymaker's state of mind: conscious choice *not* to train.

[29] Appellees produced much testimony regarding training of police (Apx. 2130-57; 2158-64). That the implementation of training is left to subordinates (Apx. 2198-2204) would seem to impose no constitutional fault upon Behan, even if the failure to train which occurred at that level, produced the constitutional injury. *City of St. Louis v. Proprotnik*, 485 U.S. ——, 108 S. Ct. ——, 99 L.Ed.2d 107 at 120, 122 (1988).

amounting to deliberate indifference. . . ." The Court continued that:

> subsequent acceptance of deliberate indifference to the *decedent's* constitutional rights by a person who makes policy, such as Chief Behan *or other high ranking police officers*, may be evidence of County's policy.
>
> A cover up instead of an exposure of possible unconstitutional actions may be considered evidence of a policy. In this regard, plaintiffs have alleged that there was a supeficial investigation of Buffington's suicide. If plaintiffs prove by a preponderance of the evidence that the investigation was superficial, then this may be used by you as evidence of a policy of non-supervision of its police officers by Behan or Kramer or Baltimore County which may amount to deliberate indifference (Apx. 2248-49).

Again, there is no definition of "policy." Moreover, the instruction seems to permit the jury to fasten liability upon the County as a result of the "acceptance of deliberate indifference to the decedent's constitutional rights by a person who makes policy such as Behan or *other high ranking police officers*. . . ." Thus, the jury could have attached liability to the County through Kramer, who counsel argued was not a policymaker (Apx. 2261-62), or any other "high ranking" officer who testified. The instruction seems to permit the jury to conclude that a "policy" of nonsupervision exists as a result of the one superficial investigation of Buffington's suicide." Assuming for argument's sake that there was a "cover up" or "superficial investigation," such must have been the responsibility of the policymaker—here, Behan. But, this record indicates that "command investigations" travel up the chain of command (Apx. 2174-76). And, the fact that the policymaker has delegated discretion to subordinates to conduct an investigation and make findings does not impose liability, through the policymaker, upon the

County. *City of St. Louis v. Proprotnik, id.* The Court's instruction, however, permits such a finding and, accordingly, this Court must reverse.

The Court instructed upon the liability of Behan and Kramer (Apx. 2249) and concluded this portion of the instruction, that:

> The liability of Chief Behan and Captain Kramer must be assessed separately and may be established by proof of the following three elements: One, that Chief Behan or Captain Kramer maintained an unconstitutional policy or custom toward suicidal detainees or, in the alternative, had actual or constructive knowledge of the existence of such a policy or custom;
>
> Two, that Chief Behan and Captain Kramer had the authority to correct such policy or custom, but with deliberate indifference failed to do so;
>
> Three, that Chief Behan and Captain Kramer should have foreseen as reasonably probable that such action in maintaining such a policy or custom or in failing to correct it and, with respect to proximate cause, set in motion series of acts which made the suicide almost bound to happen sooner or later, rather than merely likely to happen in the long run.
>
> If you find these three elements have been established as to Chief Behan or Captain Kramer or both, you must return a verdict against Baltimore County.

The problem with the instruction is that it permits the jury to return a verdict against the County upon findings made as to Kramer. There would seem to be no finding that Kramer occupied such a position.

Finally, the instructions permit the jury to return a verdict against the County based upon a finding of an "unconstitutional custom" of "Behan and Kramer" (Apx. 2247), and "Behan or Kramer" (Apx. 2249). It seems

questionable, in light of *Canton*, whether there exists such a theory. As the Supreme Court noted, the "custom" theory of liability was essentially the same as the policy theory of liability.[30] But, if custom is a viable theory in the context of failure to train, here there was insufficient evidence to support the instruction. Although Plaintiffs produced testimony regarding 57 suicides between 1975 and 19 March 1987, the CALEA standard was placed in effect in 1984; and as Behan testified, evidently implementation was the responsibility of subordinates (Apx. 2200). Moreover, for a "custom" theory to succeed here, it would seem that the individual police officers ought to have knowledge of the person's suicidal tendencies before detaining or taking the person into custody. Suicides, committed in a lockup, without more, do not necessarily lead to the conclusion that training is lacking, if the custodians are not on notice of anything which would call for the application of such training. In this regard, the suicide survey, at least since 1984 when the County placed itself under CALEA, does not seem to indicate clearly, in each case, which of the incidents involved prior notice or knowledge, by the police of suicidal tendencies (Apx. 2285-99). Moreover, Behan testified that he did not disregard incidents of suicide (Apx. 2170-73; 2186-92). The testimony indicates that Behan was aware of suicides, but also that the incidence was decreasing in relation to the population arrested (Apx. 2186-92). With respect to the command investigations of which Behan knew or should have known, Behan could have relied upon the exercise of discretion and findings of the officers in the chain of command; *Proprotnik*, *id.* Neither the fact of the suicides nor the manner of investigation can attach liability to the County through Behan.

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[30] Admittedly, Mrs. Harris presented but a single instance of alleged unconstitutional policy or custom.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs

v.

BALTIMORE COUNTY, *et al.*,
Defendants

MEMORANDUM AND ORDER

[Filed May 17, 1988]

James E. Buffington committed suicide by hanging himself on the morning of March 19, 1987, in a holding cell at the Wilkins Police Station in Catonsville, Maryland. Barbara and David Buffington bring this suit on their own behalf. Barbara Buffington also brings suit as the mother of James and as personal representative of her son's estate. Through their four-count complaint, plaintiffs seek relief pursuant to 42 U.S.C. § 1983 (Counts I and II) and also bring two pendant state law claims, one for wrongful death (Count III) and one for survival (Count IV).

Named as defendants are Baltimore County, Maryland, the County's Chief of Police, Cornelius Behan, and four members of the Baltimore County Police Department. They are Sergeant Yuska, Corporal Gribbin, Officer Harvey and Officer Gaigalas. Plaintiffs also name unidentified officers of the Police Department.

Defendants have filed a motion to dismiss or, in the alternative, for summary judgment. (Paper #12). Plaintiffs responded. (Paper #15). The matter is ripe for disposition and no hearing is necessary. Local Rule 6(G).

The Court will construe the motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The grant of a motion to dismiss for failure to state a claim on which relief can be granted is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In ruling upon the pending motion to dismiss, this Court must view the complaint in the light most favorable to plaintiffs, resolving every doubt in their behalf. 5 Wright & Miller, *Federal Practice and Procedure* § 1357 (1969). Further, the Court must accept plaintiffs' allegations as true at this stage of the litigation. *Hishon v. King & Spalding*, 467 U.S. at 73.

To state a claim under 42 U.S.C. § 1983, plaintiffs must allege that (1) defendants deprived Buffington of a right secured by the Constitution or law of the United States and that, in doing so, (2) the defendants acted under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

In attacking the complaint, defendants concede the "under color of state law" requirement but take aim at the first prong, contending there is no "constitutional duty to discover the latent suicidal tendencies" of Buffington. In addressing this contention, the Court must first identify Buffington's status at the time of his detention in the Wilkins Police Station. Clearly, he was not a prisoner incarcerated as a result of a criminal conviction. Accordingly, the Eighth Amendment right to be free from cruel and unusual punishment does not apply because that right attaches only to criminals serving a

sentence. *Ingraham v. Wright*, 430 U.S. 651, 670-671 n. 40 (1977). The Court believes Buffington was a pretrial detainee, therefore, according to *Ingraham*, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id.* at 671-672 n. 40. However, in this case an analysis under the Fourteenth, rather than Eighth, Amendment is a difference without a distinction because a pretrial detainee has due process rights at least as great as the Eighth Amendment protections accorded to a convicted prisoner. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). Indeed, a pretrial detainee has a Fourth Amendment due process right to be free from punishment altogether. *Bell v. Wolfish*, 441 U.S. 520 (1979).

The relevant inquiry under the Due Process Clause is whether a pretrial detainee is punished prior to an adjudication of guilt in accordance with due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). A closely related question is whether there exists a constitutional duty in favor of a pretrial detainee to be protected from suicide. That question seems to turn on whether the pretrial detainee's suicidal tendencies are latent or obvious. *Cf. Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied sub nom., Gagne v. Putnam*, 107 S.Ct. 3266 (1987) (for a subsequent ruling in that case see *Gagne v. City of Galveston*, 671 F.Supp. 1130 (S.D. Tex. 1987) *with Danese v. Asman*, 670 F.Supp. 729, 735 (E.D. Mich. 1987). *See also Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986); *Danese v. Asman*, 670 F.Supp. 709 (E.D. Mich 1987); *Strandell v. Jackson County*, 634 F.Supp. 824 (S.D. Ill. 1986); *Holland v. Breen*, 623 F.Supp. 284 (D. Mass. 1985); *Madden v. City of Meriden*, 602 F.Supp. 1160 (D.Conn. 1985); *Guglielmoni v. Alexander*, 583 F.Supp. 821 (D. Conn. 1984); *Matje v. Leis*, 571 F.Supp. 662 (1983); *Miga v. City of Holyoke*, 398 Mass. 343, 497 N.E.2d 1 (1986).

A violation under the Fourteenth Amendment exists where a detainee's suicidal tendencies are obvious to those confining him. This approach seems consistent with *Bell v. Wolfish*, 441 U.S. 520, 537 (1979), because knowledge or notice that a detainee is capable and perhaps willing to take his own life converts an otherwise lawful confinement into punishment when the jailors show deliberate indifference to the confined's capacity or ability to kill himself.[1]

Plaintiff's complaint, far from defendants' characterization as *latent* suicidal tendencies by Buffington, reveal that, if taken as true, the defendants had ample notice of Buffington's ability to take his own life. Buffington lived with his parents, but on March 19, 1987, his parents were vacationing. Alone, Buffington penned a suicide note, left it on the dining room table, broke into his father's gun collection, took at least five guns and ammunition, and drove off in his father's car.

Buffington's brother lived next door. He knew his parents were away, and he knew Buffington did not have a valid driver's license. Therefore, he ran over to his parents' house and found lights on and music blaring. He also found the suicide note and noticed the gun closet had been forced open. He called "911", reporting a potential suicide. Defendants Harvey and Gribbin arrived

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[1] The Court notes that "deliberate indifference" is a legal term of much significance in the context of *Estelle v. Gamble*, 429 U.S. 97 (1976), which was a case involving a convict, thus invoking the Eighth Amendment. But in this Circuit, the Eighth Amendment cannot be ignored when assessing a pretrial detainee's Fourteenth Amendment claims. A comparison is useful. *Cooper v. Dyk*, 814 F.2d 941, 948-49 (4th Cir. 1987); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978). *See also Norris v. Frame*, 585 F.2d 1183, 1186-87 (3d Cir. 1978); *Jensen v. Conrad*, 747 F.2d 185, 194 n. 11 items 1 and 3 (4th Cir. 1984) (noting an affirmative duty of protection under the Fourteenth Amendment where a "special relationship" accrues when factors such as custody and notice are a part of the relationship).

on the scene at 5:05 a.m., read the suicide note, then left in search of Buffington. At 6:25 a.m. Harvey telephoned, informing Buffington's sister-in-law that Buffington had been found alive. Buffington told the police that the only reason he was found alive was because he could not decide which gun to use. Later, the police called Buffington's brother and told him they were getting the papers together so that Buffington could receive emergency psychiatric evaluation at a hospital. Also, defendant Harvey advised Buffington's brother to press criminal charges against Buffington. According to Harvey, this would serve as a safeguard, allowing the police to detain Buffington should he be refused emergency psychiatric treatment.

While completing the paperwork, the police put Buffington alone in a holding cell. There, he hung himself with his pants as a noose. In sum, as alleged, plaintiff states a cause of action. Buffington's suicidal tendencies were not latent; they were ubiquitous.

* * * *

In accordance with the foregoing, it is this 17th day of May, 1988, by the United States District Court for the District of Maryland, ORDERED:

1) that defendants' motion to dismiss BE, and the same hereby IS, DENIED in full; and

2) that the Clerk mail copies of this Memorandum and Order to counsel of record.

/s/ Joseph C. Howard
JOSEPH C. HOWARD
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO RECONSIDER

[Filed June 13, 1988]

Baltimore County, Maryland, et al., Defendants, by their undersigned attorneys, respectfully request that this Honorable Court reconsider the rulings contained in its Memorandum and Order filed on May 17, 1988. This Motion is filed pursuant to Rule 7(b) and in support thereof, Defendants say:

1. The Defendants respectfully disagree that the Decedent, David Buffington's suicidal tendencies were obvious to the officers at the Wilkens Station who were charged with the duty of detaining and processing him. The facts as alleged by the Plaintiffs indicate that, at the time of the arrest, Mr. Buffington was calm and docile and that he exhibited no overt suicidal tendencies. Accepting all of the facts pleaded as true, a significant amount of time elapsed between the time that the police were notified of Mr. Buffington's disappearance and his apprehension. He showed no inclination to take his own life between the time of his apprehension and the time

he was placed in the holding cell. Given these facts, it is submitted that none of the officers involved in arresting or processing the Decedent acted in any way to deprive him of his Due Process rights under the 14th Amendment. There is no indication that Mr. Buffington was, in the least, overtly suicidal during any phase of his detention.

Even assuming, *arguendo*, that the officers involved knew of Mr. Buffington's suicidal tendencies, that alone does not attach liability to their actions. This Court, in its Opinion, makes reference to the "deliberate indifference" standard set forth in this Circuit in *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987) and other cases. It is submitted that the standard of "deliberate indifference" is inapplicable to the police officers in this case. Clearly, if the officers knew of Mr. Buffington's suicidal tendencies and had done nothing to secure medical attention, a claimed violation of his constitutional rights would have been stated. But the Complaint alleges, correctly, that the officers at the Wilkins Station were making every effort to have Mr. Buffington committed for a psychiatric evaluation. In addition, Mr. Buffington was stripped of every article of clothing except his blue jeans in an effort to protect him from himself. These actions can hardly be characterized as deliberate indifference to the Decedent's plight. It is, therefore, submitted that none of the actions of the officers constitute "deliberate indifference" or an actionable constitutional violation. *See Sasebee v. Murphy*, 797 F.2d 179 (4th Cir., 1986).

* * * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO AMEND INTERLOCUTORY ORDER

[Filed Oct. 18, 1988]

Baltimore County, Maryland, et al., Defendants, by its undersigned attorneys, respectfully moves this Honorable Court to Amend the Interlocutory Order entered in these proceedings by the Court on October 13, 1988 and as grounds therefore state as follows:

1. On October 13, 1988, this Court entered in the above-entitled proceedings a Memorandum and Order denying the Defendants' Motion for Summary Judgment. The Defendants in these proceedings seek permission to take an immediate appeal under the provisions of Title 18, U.S.C., Section 1292(b). The above-described Order does not contain the statement that, under such Code Section, must be included before an appeal from any interlocutory Order may be taken. Therefore, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, the Defendants move the Court to amend such Order to include the following statement on the last page of said Order:

"In the opinion of the Court, this Order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

2. In support of this Motion, the Defendants respectfully represent to the Court as follows:

(a) The Order of this Court as aforesaid involves a controlling questions of law for the reasons that the rulings made by the Court in this Order incorporate previous rulings of the Court which hold that Baltimore County, Maryland, as a subdivision of the State of Maryland, has waived governmental immunity by the establishment of a program of self-insurance, which implied waiver of governmental immunity now exposes Baltimore County to liability under the pendent State law claims presented in this litigation. Further, the Order of this Court refuses to adjudicate the effect of the provisions of Sections 11-108 and 11-109 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland restricting the non-monetary damages that can be awarded in these proceedings. Further, the Opinion of this Court failed to address the immunity of Baltimore County, Maryland from damages under 42 U.S.C. Section 1983 in light of the materials presented in the body of the Motion for Summary Judgment demonstrating the non-existence of a policy, custom, practice or procedure of Baltimore County, Maryland that resulted in the constitutional deprivations alleged.

(b) A substantial ground for a difference of opinion as to such Order exists inasmuch as the United States Court of Appeals for the Fourth Circuit has conclusively determined that the existence of a program of self-insurance does not operate as an implied waiver of any existing State law based immunities. *See Westinghouse Electric Corp. v. West Virginia Department of Highways*, No. 87-2107 (4th Cir., 1988). Further, the Appellate Courts

have repeatedly held that a waiver of governmental immunity must be expressed and cannot be implied from the maintenance of a program of liability insurance. *See Snyder v. Dept. of Health, et al.*, 40 Md. App. 364 (1978). Similarly, this Court's ruling concerning immunity of necessity constitutes a ruling that the provisions of Sections 11-108 and 11-109 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland are inapplicable to the case at bar. By virtue of this Court's refusing to limit the scope of damages to the $350,000.00 limit imposed by these statutory provisions, this Court is in effect determining that these statutory provisions does not apply to actions such as the case at bar. Such a ruling is manifestly contrary to the specifically expressed intention and purpose of these by a statutory law, copies of which are attached hereto as Exhibit "A".

Further, this Court's rulings concerning the liability of Baltimore County, Maryland under 42 U.S.C. Section 1983 are contrary to the rulings of the United States Court of Appeals for the Fourth Circuit and the rulings of the Supreme Court of the United States in cases that are factually similar, if not identical, to the case at bar. *See Abshire v. Walls*, 830 F.2d 1277 (4th Cir., 1987); *Freedom v. City of Allentown, Pennsylvania*, 853 F.2d 1111 (3rd Cir., 1988); *Davidson v. Cannon*, 474 U.S. 344 (1986).

3. An immediate appeal from such Order will materially advance the ultimate termination of the litigation because an adjudication of these issues will result in a dismissal of these proceedings as to Baltimore County, Maryland and will control the scope of the proceedings and the scope of the Jury's deliberations, particularly with respect to the Jury's assessment of damages. If for no other reason, the resolution of these issues by the Court of Appeals will expedite the trial of these proceedings by giving to this Court guidance with respect to the

manner in which these issues are to be addressed during the course of the trial of these proceedings.

4. The Order is not otherwise appealable under Title 28, U.S.C. Section 1292.

5. The Defendants further move this Honorable Court for an Order staying furtner proceedings in this Court pending appeal by the Defendants from the above-described Order as amended, specifically continuing the trial date currently scheduled for November 2, 1988, at 9:30 a.m.

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APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
Joseph C. Howard
United States District Judge

101 W. Lombard Street
Baltimore, Maryland 21201-2678
(301) 962-7724
FTS 922-7724

October 24, 1988

James G. Beach, III
Assistant County Attorney
Baltimore County Office of Law
2nd Floor, Old Courthouse
Towson, Maryland 21204

Re: Buffington, et al. v. Baltimore County, Maryland, et al.
Civil No. JH-87-3284

Dear Mr. Beach:

The Court is in receipt of your "Motion to Stay Proceedings Pending Appeal" which was filed today. In your motion, you request a stay so that the Fourth Circuit can rule on the question of qualified immunity. Because you have *never* raised *that* issue in *this* Court, your motion is denied, and the case will proceed as scheduled on November 2, 1988 at 9:30 a.m.

Notwithstanding the informal nature of this ruling, it constitutes an Order of the Court.

Very truly yours,

/s/ Joseph C. Howard
JOSEPH C. HOWARD

JCH:dp

cc: William F. Gately, Esq.
Daniel W. Whitney, Esq.
Court file

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Harrison L. Winter
Chief Judge
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201-2664

October 28, 1988

Mr. John M. Greacen, Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth & Main Streets
Richmond, VA 23219

Re: Barbara Buffington, et al. v. Baltimore County, et al.
Civil Action No. JH-87-3284

Dear Mr. Greacen:

I enclose for filing the original copy of a motion to stay proceedings pending appeal and a response on behalf of the plaintiffs.

I received the papers today and heard counsel in chambers this afternoon.

Because I am in agreement with the district court that the defense of qualified immunity has not been raised, and for the further reason that I do not see how qualified immunity applies in this case, I concluded to deny the stay.

Please prepare and enter an order to that effect.

Sincerely,

/s/ Harrison L. Winter
HARRISON L. WINTER
Chief Judge

HLW/bps
Enclosures

cc: Hon. Joseph C. Howard
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201

James G. Beach III, Esq.
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APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1161 (L), 89-1021, 89-1040, 89-1054

BARBARA BUFFINGTON, *et al.*,
Appellees,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Appellants.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

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Counsel for Appellants

November 27, 1989

* * * *

Applying these standards, the Sixth Circuit in *Danese* held that the "right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide" were not "particularized rights as required by *Anderson* and, thus, were not sufficient to deny the defendants qualified immunity." 875 F.2d at 1243-44. The court also held that the claims against the policy-making defendants in the case had to be dismissed because:

> [i]f the officers were not subject to a clearly established constitutional duty [to protect appellee from committing suicide], their supervisors cannot be liable for not training them to meet such a duty.

Id. at 1245. The holding of *Danese* with regard to qualified immunity is directly on point and, if applied, requires dismissal of all claims against the individual Appellants.

* * * *

Supreme Court, U.S.
FILED
FEB 15 1991
OFFICE OF THE CLERK

(3)

No. 90-1123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONERS

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* Counsel of Record

February 15, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1123

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONERS

Instead of addressing whether the important and recurring constitutional questions presented are worthy of this Court's attention, respondents devote all but four pages of their 30-page brief to a completely disingenuous series of "waiver" arguments. In fact, the two questions presented were not waived in any court. Moreover, for purposes of this petition, it is absolutely indisputable that both questions were fully addressed *and* decided in the published opinion of the Fourth Circuit. See Pet. App. 8a-15a.

At the end of the day, the questions presented regarding the scope of a state actor's affirmative custodial obligations under the Due Process Clause and the right to qualified immunity from claims relating to such obligations are extraordinarily important to the operation of local government. There is a conflict among the circuits on both of these issues, and therefore, the questions presented clearly are appropriate for review by this Court.

1. The "due process" issue is "[w]hether the Due Process Clause . . . imposes upon state actors an affirmative obligation to prevent a person in government custody from committing suicide." Pet. i. This Court's standard for determining whether a question was "waived" below is well-established: this Court ordinarily will not review a question not pressed or passed upon by the court below. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958) ("[o]nly in exceptional cases will this Court review a question not raised in the court below"); see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Husty* v. *United States*, 282 U.S. 694, 701-02 (1931); *California* v. *Taylor*, 353 U.S. 553, 556 n. 2 (1957); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *Kibbe*, 480 U.S. at 266 (O'Connor, J., dissenting).

Respondents—with good reason—never cite this Court's "waiver" rule because the question presented was *both* pressed and passed upon by the court below. The Fourth Circuit expressly stated that:

> All the appellants challenge the [judgment] on the ground that the asserted constitutional right to some measure of protection from suicide under these circumstances does not exist. Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide . . . .

Pet. App. 8a. The court considered the arguments on both sides of the question and concluded that it would

"reject th[e] [appellants/petitioners'] argument." *Id.* It is difficult to imagine a situation where a purely legal question is more clearly pressed and passed upon by an appellate court.

Moreover, to prove that petitioners raised precisely this point in the district court, this Court need look no further than *respondents'* brief, which quotes petitioners' counsel's argument to the district court that "[t]here is no constitutional standard requiring inmates to be protected from committing suicide." Opp. 8 (quoting App. 40a).[1] Thus, to the extent that this Court's waiver rule requires a question to be presented to the district court as well as the court of appeals, the question here was presented to and passed upon by the district court.[2]

2. With respect to the waiver of the qualified immunity issue, respondents again provide this Court with evidence that the issue specifically was raised in the district court. Respondents have provided the Court with a copy

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[1] Respondents attempt to prove a negative by quoting extensively from portions of petitioners' submissions in the lower courts that were, in many cases, addressed to different facets of the due process issue. However, even a cursory review of the pleadings reproduced by respondents demonstrates that the due process and qualified immunity issues were presented in an appropriate fashion in both courts. See Brief in Opposition Appendix ("Opp. App."), at 40a (raising due process issue); *id.* at 3a-5a (raising qualified immunity issue by reliance on *Gagne*).

[2] Respondents rely on the fact that this issue was not raised in a motion for directed verdict or motion for judgment notwithstanding the verdict. *If* this were a question of fact or of the sufficiency of the evidence, perhaps this might be relevant, see Fed. R. Civ. P. 50, but there is no obligation to "preserve" a purely legal argument in the fashion suggested by respondents.

Moreover, although the questions presented actually were raised in both courts below, this Court previously has suggested that it may decide purely legal issues regardless of whether such issues have been pressed or passed upon by the courts below. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982); *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985).

of petitioners' memorandum in support of their motion to dismiss, or in the alternative, for summary judgment, in which the qualified immunity argument clearly is set forth. Petitioners cited *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), for the general principles of qualified immunity and argued that in *Gagne* v. *City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987),

> the Court of Appeals for the Fifth Circuit dismissed claims factually and legally identical to the claims in the case at bar, using the following language:
>
> > . . . The plaintiffs have not cited any case suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested. Indeed, the case of *Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. Thus, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1932), and *Elliot* v. *Perez*, 751 F.2d 1472 (5th Cir. 1985), the claim against Putnal must be dismissed.

Opp. App. 4a-5a. The district court rejected this argument, but respondents are absolutely incorrect in stating that the issue of qualified immunity under *Harlow* was "waived" in the district court.

Petitioners reasserted their right to a qualified immunity in the Fourth Circuit. They argued, *inter alia*, that "the doctrine of qualified immunity protects public officials even when there is a finding that constitutional rights have been violated." See Pet. App. 68a (quoting petitioners' reply brief in Fourth Circuit). According to petitioners, respondents had failed to meet their burden of showing that the right in question—the right to be protected from suicide as a condition of custody—was " 'clearly established in a particularized sense so that

the contours of the right are clear enough for any reasonable official in the [petitioners'] position to know that what the official is doing violates that right.'" Pet. App. 69a (citations and internal quotation marks omitted).

Although the Fourth Circuit characterized petitioners' arguments in support of their right to qualified immunity as "confused" or unclear, it acknowledged that the reply brief—which is quoted above—could be read "as raising a distinct issue of qualified immunity." Pet. App. 13a. The court below nevertheless "decline[d] to give the appellants the benefit" of "a liberal reading" of their opening brief and, accordingly, refused to consider the qualified immunity issue because, in the courts' view, it had been insufficiently argued in the opening brief.[3]

Putting aside the question of whether the court below erred—for reasons set forth in the petition (see Pet. 14-15)—in refusing to rule upon the constitutional immunity question because it was inadequately argued, the *issue* of qualified immunity was raised or litigated in *both* of the lower courts. The treatment of this issue below is more than necessary to preserve the question for review in this Court. *Kibbe*, 480 U.S. at 259; see *id.* at 266 (O'Connor, J., dissenting).

At bottom, respondents' "waiver" arguments reflect no jurisdictional, statutory or prudential bar to this Court's review of the important questions presented. In fact, the

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[3] The immunity to which petitioners are entitled is immunity from trial. Thus, the question of whether the immunity is applicable is purely a question of law. See, *e.g.*, *Rakovich* v. *Wade*, 850 F.2d 1180, 1204 (7th Cir.) (qualified immunity is "legal question reviewed *de novo* by the appellate court . . . [which is] not bound by the officers' incorrect citation of the law . . . ."), *cert. denied*, 488 U.S. 968 (1988). Respondents' reliance on arguments relating to the motion for directed verdict or the jury instructions (see, *e.g.*, Opp. 18-19)—which are solely relevant to resolution of questions of fact—is misplaced. If petitioners are entitled to immunity, judgment should be entered in their favor, regardless of the conclusions of the jury or of any court below. See *supra*, note 2.

weakness of respondents' "waiver" argument speaks volumes regarding respondents' confidence in their ability to convince this Court that the questions presented are not otherwise worthy of review.

3. If the "waiver" arguments are removed from the opposition, respondents' only assertion is that the Fourth Circuit was correct in finding an affirmative duty to prevent custodial suicide in the Due Process Clause. Opp. 11-14. That argument rests on nothing more than respondents' continuing refusal to acknowledge that this is *not* a case about a failure of *medical* care but rather a case about *custodial* care.[4] On the issue of what custodial obligations arise directly out of the Due Process Clause, there is a conflict in the circuits, which this Court never has addressed. See Pet. 8.

Respondents' attempt to distinguish the conflict between *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990) and the decision below misreads both the facts and the holding of *Danese*. Respondents state that "*Danese* involved a situation involving a *latently* suicidal detainee." Opp. 26 (emphasis in original). Thus, according to respondents, the holding in *Danese* is limited to claims of inadequate "screening" for suicidal tendencies. Respondents' assertion is plainly belied by the Sixth Circuit, which described the facts as follows:

---

[4] See Pet. 8-11. With respect to his *medical* care, the police were expeditiously preparing the papers necessary to commit James Buffington to a hospital at the time of his suicide. Respondents have never suggested that the police acted inappropriately with respect to the "medical" aspect of their response. The "constitutional injury," if any, arises not from a failure of medical care but from the fact that James Buffington was placed, unattended, in a cell with horizontal bars across the ceiling. The claim has nothing to do with medical care and everything to do with the conditions of his custody; thus, respondents' only challenge to petitioners' conduct focuses on the custodial treatment of James Buffington, not his medical care. See Pet. 8.

> Danese told [the police] that he was going to kill himself and talked about methods of killing himself, but the officers did nothing. He was placed fully clothed in a regular cell.

875 F.2d at 1243. The argument in *Danese*—which is identical to respondents' argument in this case—is that the police "violated Danese's clearly established right to safe confinement." *Id.* at 1245.[5]

The Sixth Circuit, unlike the court below, rejected the position that "police officers must detect suicidal prisoners and put them into suicide-proof facilities." *Id.* at 1244. The court distinguished cases involving claims of failure to provide "requested medical care" from the claim based on failure to take "extraordinary measures to restrain Danese." *Id.* at 1244. With respect to conditions of custody, the court noted that it could find no "cases holding that there exists a clearly established right to these suicide prevention facilities." *Id.* at 1245. Accordingly, it concluded that the individual police officers were immune from constitutional liability for failure to prevent Danese's suicide.

4. Finally, there can be no question that the issues in this case are of tremendous practical significance. Respondents note that their expert testified about suicide prevention in jails, and they point out that he explained that "training" is not very expensive. Opp. 4 n. 1. However, respondents do not dispute petitioners' claim that if a duty to prevent custodial suicide is read into the Due Process Clause, there will be significant costs incurred, in building or remodeling jails or employing additional guards, in order to create "suicide-proof" facilities. Nor do they dispute petitioners' common sense observation that such expense will be particularly burdensome on

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[5] Specifically, the plaintiffs in *Danese* asserted a due process right to "safe confinement conditions" while in police custody, including a "detoxification cell without horizontal bars and with a working television monitor." *Id.* at 1245.

smaller and more rural communities that lack the resources to meet these demands. Whether the burdens of such a constitutional obligation should be borne by all the cities, towns and counties in North Carolina, South Carolina, Virginia and Maryland is a matter of great practical significance that warrants a decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 15, 1991

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